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CASES

ON THE

LAW OF DAMAGES

SELECTED BY

FLOYD R. MECHEM

Author of Mechem on Agency, etc., Tappan Professor
of Law in the University of Michigan

SECOND EDITION

St. Paul, Minn.
WEST PUBLISHING CO.
1898

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NOTE.

The following selection of cases in the law of Damages has been made primarily for use in connection with the lectures upon that subject given in the Law Department of the University of Michigan. The purpose has been partly to supply illustrations of the application of principles referred to in the lectures, and partly to supplement the lectures by rounding out the view of certain fields not otherwise completely developed.

Arbitrary, but inexorable, considerations of size and price have determined the scope of the selection; and, for reasons perhaps sufficiently obvious, preference has been given, when possible, to cases which have appeared in the National Reporter System. It is, however, due to the publishers to say that, with respect to both of the considerations above mentioned, their attitude has been constantly generous.

The cases, as a rule, are not annotated, and they have usually been reproduced entire, although some parts of them may not be germane to the subject of Damages. F. R. M.

UNIVERSITY OF MICHIGAN,
Ann Arbor, November 1, 1898.

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CASES

ON THE

LAW OF DAMAGES

SECOND EDITION

WEBB v. PORTLAND MANUF'G CO.

(Fed. Cas. No. 17,322; 3 Sumn. 189.)

U. S. Circuit Court, D. Maine. May Term, 1838.

In equity. On bill for injunction.

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On the stream on which the mill was situated were two dams, the distance between which was about 40 or 50 rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam. A preliminary question, suggested by the court, was argued on the bill and answer.

C. S. Daveis, for plaintiff. P. Mellen and Mr. Longfellow, for defendants.

STORY, J. The question which has been argued upon the suggestion of the court is of vital importance in the cause, and, if decided in favor of the plaintiff, it supersedes many of the inquiries to which our attention must otherwise be directed. It is on this account that we thought it proper to be argued separately from the general merits of the cause.

The argument for the defendants, then, 1 presents two distinct questions. The first is whether, to maintain the present suit, it is essential for the plaintiff to establish any actual 2 damage. The second is whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. 3 In connection with these questions, the point will also incidentally arise whether it makes any difference that such drawing off of the water above can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is damnum absque injuria; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that injuria sine damno is not actionable. See Mayor of Lynn, etc., v. Mayor of London, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him. So long ago as the great case of Ashby v. White, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion (page 14) Lord Holt says: "It is impossible to imagine any such thing as injuria sine damno. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. 955. And he cites many cases in support of his position. Among these is Starling v. Turner, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll, and it was determined that the action was maintainable for the refusal of the poll. Although it might have been that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from 23 Edw. III. 18, tit. "Defense," (it is a mistake in the MS., and should be 29 Edw. III. 18b; Fitz. Abr. tit. "Defense," pl. 5,) and 11 Hen. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due, yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in Hunt v. Dowman, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held that the action well lay, though no waste was committed and no actual damage done, for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So Herring v. Finch, 2 Lev. 250, where it was held that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate, for whom he might have voted, might not have been chosen, and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case, for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See Harman v. Tappenden, 1 East, 555; Drewe v. Coulton, Id. 563, note; Kilham v. Ward, 2 Mass. 236; Lincoln v. Hapgood, 11 Mass. 350; 2 Vin. Abr. "Action, Case," note c, pl. 3. In the case of Ashby v. White, as reported by Lord Raymond, (2 Ld. Raym. 953,) Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to Mellor v. Spateman, 1 Saund. 346a, note 2; Wells v. Watling, 2 W. Bl. 1233; and the case of the Tunbridge Dippers, (Weller v. Baker,) 2 Wils. 414,—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, ego assentior scævolœ. The case of Williams v. Morland, 2 Barn. & C. 9, 10, seems to have proceeded upon the ground that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle it is not now necessary to say. Some of the dicta in it have been subsequently impugned, and the general reasoning of the judges seems to admit that, if any right of the plaintiff had been violated, the action would have lain. The case of Jackson v. Pesked, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire whether there was not an overnicety in the application of the technical principles of pleading to that case, although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of Young v. Spencer, 10 Barn. & C. 145, turned also upon the point whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice Bayley) at the trial than with the decision of the court in granting a new trial. But the court admitted that, if there was any injury to the reversionary right, the action would lie; and, although there might be no actual damage proved, yet, if anything done by the tenant would destroy the evidence of title, the action was maintainable. A fortiori, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, Marzetti v. Williams, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In Hobson v. Todd, 4 Term R. 71, 73, the court decided the case upon the very distinction, which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Grose, in Pindar v. Wadsworth, 2 East, 162. But the case of Bower v. Hill, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. The case of Blanchard v. Baker, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed for a moment that Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and a fortiori that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. See Eden, Inj.; 2 Story, Eq. Jur. c. 23, §§ 86–959; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendants, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, a fortiori, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not, indeed, entertain a bill for an injunction in case of a mere trespass fully remediable at law. But, if it might occasion irreparable mischief or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 Story, Eq. Jur. §§ 926–928, and the cases there cited; Jerome v. Ross, 7 Johns. Ch. 315; Van Bergen v. Van Bergen, 3 Johns. Ch. 282; Turnpike Road v. Miller, 5 Johns. Ch. 101; Gardner v. Village of Newburgh, 2 Johns. Ch. 162.

Let us come, then, to the only remaining question in the cause, and that is whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in Wright v. Howard, 1 Sim. & S. 190, by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. See, also, Bealey v. Shaw, 6 East, 208. "Prima facie," says that learned judge, "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of Tyler v. Wilkinson, 4 Mason, 397, 400–402; and also in the case of Blanchard v. Baker, 8 Greenl. 253, 266. In the latter case the learned judge (Mr. Justice Weston) who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." The case of Mason v. Hill, 5 Barn. & Adol. 1, contains language of an exactly similar import, used by Lord Denman in delivering the opinion of the court. See, also, Gardner v. Village of Newburgh. 2 Johns. Ch. 162. Mr. Chancellor Kent has also summoned up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent, Com. [3d Ed.] lect. 42, p. 439;) and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books the doctrine is quaintly, though clearly, stated; for it is said that a water-course begins ex jure naturæ, and, having taken a certain course naturally, it cannot be [lawfully] diverted. Aqua currit, et debet currere, ut currere solebat. Shury v. Piggot, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being that the right of a riparian proprietor arises by mere operation of law as an incident to his ownership of the bank, and that of a mill-owner as an incident to his mill. Bealey v. Shaw, 6 East, 208; Saunders v. Newman, 1 Barn. & Ald. 258; Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; Blanchard v. Baker, 8 Greenl. 253, 268; and Tyler v. Wilkinson, 4 Mason, 397, 400–405,—are fully in point. Mr. Chancellor Kent in his Commentaries relies on the same principles and fully supports them by a large survey of the authorities. 3 Kent Comm. (3d Ed.) lect. 52, pp. 441–445.

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream, and may become the foundation of an adverse right in the defendants. In such a case actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period without damage, and without any pretense of right. In such a case, the wrong, if there be no sensible damage, and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case) be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water which is permanently maintained. The necessary result of lowering the head of water permanently would seem, therefore, to be a direct diminution of the value of the privileges; and, if so, to that extent it must be an actual damage.

Again, it is said that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use for their own mills on the lower dam half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill-pond? Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that, by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to; for, pro tanto, it will operate in the same manner; and, if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege attached to the mills of the plaintiff is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water-power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled per my et per tout to his proportion of the whole bulk of the stream, undivided and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and, what alone would be decisive, it has the express sanction of the supreme court of Maine in the case of Blanchard v. Baker, 8 Greenl. 253, 270. The court there said, in reply to the suggestion that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, (before it passed the lands of another proprietor.) Besides, it was possible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water, by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein, and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another, or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider. I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

PAUL v. SLASON et al.

(22 Vt. 231.)

Supreme Court of Vermont. Rutland. Jan. Term, 1850.

Trespass for taking two cords of wood, two baskets, two pitchforks, two horses, one harness, and one wagon. Plea, the general issue, with notice, that the defendant Charles H. Slason attached the property by virtue of a writ, which he was legally deputised to serve, in favor of one Langdon against the plaintiff, and that the other defendants aided him in so doing, at his request. Trial by jury, September Term, 1848,—Hall, J., presiding. On trial it appeared, that on the twenty sixth day of September, 1844, the defendant Francis Slason commenced a suit in the name of Benjamin F. Langdon against the plaintiff, and that the defendant Charles H. Slason, who was legally deputized to serve the writ, which was returnable to the county court, attached the property in question, except one pitchfork, and that the defendant Pelkey assisted in removing the property. It also appeared, that on the same day Charles H. Slason and Pelkey made use of the horse, wagon and harness, part of the property attached, in removing grain and other property, which was attached at the same time, on the same writ, and upon the same farm, and continued to use them for this purpose through the day; and that on the next day Charles H. Slason was seen driving the same horse and wagon, with the harness, in the highway in the vicinity,—but upon what business did not appear. It also appeared, that the defendants took a pitchfork belonging to the plaintiff, and used it during the day, on which the attachment was made, in removing the grain &c. The defendants offered in evidence the files and record of the supreme court, in the suit in favor of Langdon against the plaintiff, in which the property in question was attached, for the purpose of proving, that judgment was rendered therein in favor of Langdon;—to which evidence the plaintiff objected; but it was admitted by the court. The defendants then offered in evidence an execution, purporting to have been issued upon the judgment in the supreme court above mentioned, dated February 21, 1848;—to the admission of which the plaintiff objected, insisting, that an exemplified copy of the judgment should be produced, before the execution could be *given in evidence, *233 and that the execution, and the issuing thereof, could be shown only by a certified copy of the record of the judgment;—but the objection was overruled by the court.

The defendants then offered in evidence the return of one Edgerton, as sheriff, upon the said execution, to show that the wagon in question was sold thereon and the proceeds applied in payment of the debt. To the admission of this evidence the plaintiff objected, upon the ground, that from the return it appeared, that the property was sold two days after the sheriff received the execution for service, as shown by his indorsement upon it. The counsel for the defendants then suggested, that there was a mistake in the return, in stating the day of the sale, and moved the court, that the sheriff have leave to amend his return in that particular. To this the plaintiff objected; but the court permitted the sheriff to amend his return, so as to state the day of sale to have been one month later than stated originally in the return. The defendants then offered in evidence the return, as amended; to which the plaintiff objected,—but the objection was overruled by the court. The defendants then offered in evidence the return of the sheriff upon the original writ in favor of Langdon against the plaintiff, showing an appraisal of the horse and some other property attached, and that the plaintiff had furnished security to the sheriff and received possession of the property. It appeared, that the money had not been paid on the security, and no application of the property had ever been made upon the execution by the sheriff, or by any other person. The defendants also proved, that one McCune had executed a receipt to the sheriff for a portion of the property attached, and that the property, except the wagon which was sold upon the execution, went into the possession of the plaintiff. The plaintiff requested the court to charge the jury,—1. That the defendants could not justify the taking of the property in question under the writ in favor of Langdon, if the property attached, or any portion thereof, were put to use by the officer who had attached it. 2. That property attached must be considered as in the custody of the law, and the attaching officer has no authority to put it to use; and if, in this case, they found, that, upon the property being attached by Charles H. Slason, he put the horse, wagon and harness, to use, and continued to use them, during the greater part *of the day, *234 in removing the other property attached, he rendered himself a trespasser *ab initio*, and could not justify taking the property, or any part thereof, under the attachment. 3. That if the officer could justify the taking of the property under the attachment, if he so used any part of it, he could not justify the taking of the horse, wagon and harness so used; but, as to the property so used, the authority was rendered void by the abuse. 4. That the use of the horse, wagon and harness, on the next day after the attachment, was unjustifiable, and rendered the officer a trespasser *ab initio*. 5. That the application of the plaintiff to have the property appraised, under the statute, in order to regain the possession of it, and giving security to the sheriff, was not a waiver of the right of action against the defendant for the trespass; but that the plaintiff was entitled to recover the amount thus secured by him. 6. That if a portion of the property were delivered to the receiptor, the plaintiff was entitled to recover its value, unless it had come to his possession. 7. That if the jury found, that the defendants took the plaintiff's pitchfork and used it during the day, without right, he was entitled to recover its value, unless it were returned,—and that, if returned, he was entitled to recover nominal damages. 8. That the sale of the wagon and the application of its proceeds upon the execution in favor of

Langdon could have no effect upon the amount of damages in this suit. But the court charged the jury, that, from the testimony, the attachment and disposition of the property attached was a justification for the defendants, unless they had been guilty of such an abuse of the property, as to make them trespassers *ab initio;*—that whether the defendants were trespassers *ab initio* depended upon the character of the use of the property by them, after the attachment;—that the use of the horse, wagon and harness, in removing and securing other property of the plaintiff, attached the same day, on the same writ and on the same farm with the horse, wagon and harness,—the use being for a part of the day only,—would not necessarily be such an abuse of the officer's authority, as to make the defendants trespassers *ab initio;* but that if they found, either that such use of the property by the defendant was wanton, and with a design to injure the plaintiff, or that the property was injured by it so as materially to diminish its value, the defendants would be trespassers *235 *in the original taking and be liable in this action;—that whether the driving of the horse and wagon by the officer, the next day after the attachment, was an abuse of his authority depended upon the purpose and business, for which they were driven; that if the jury found, that the officer was using the horse and wagon for other purposes than that of removing and securing them in a convenient place for keeping, under the attachment, the defendants would be liable; but if for such a purpose, they would not be liable. In regard to damages, the court instructed the jury, that, the property having either been sold and applied on the execution, or delivered to the plaintiff on security furnished by him, the plaintiff would not be entitled to recover the full value of it; but that the measure of damages would be the amount, which the property had been diminished in value by the defendants' abuse of it. In regard to the pitchfork the court charged the jury, that if they believed, from the evidence, that the defendants took and carried it away, they should give the plaintiff its value; that if it was used and left upon the premises, so that the defendant received it again, and it was injured by the use, the plaintiff would be entitled to recover the amount of the injury; but that if they found, that it was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for such use. The jury returned a verdict for the defendants. Exceptions by plaintiff.

M. G. Evarts and *Thrall & Smith*, for plaintiff, cited Lamb v. Day 8 Vt. 407; 3 Stark. Ev. 1108; 1 Chit. Pl. 171; 5 Bac. Abr. 161; Strong v. Hobbs, 20 Vt. 185; Hart v. Hyde, 5 Vt. 328; Orvis v. Isle La Mott, 12 Vt. 195; Fletcher v. Pratt, 4 Vt. 182; and Brainard v. Burton, 5 Vt. 97.

E. Edgerton, for defendants, cited 2 Greenl. Ev. § 253; Ib. 283, § 276, n. 5; 1 Stark. Ev. 151, § 33; Mickles et al. v. Haskin, 11 Wend. 125; Lamb v. Day, 8 Vt. 407.

*The opinion of the court was delivered by *236

POLAND, J. The first question, arising in this case, is in relation to the charge of the county court to the jury as to the use of the horse, wagon and harness by the defendants, in removing the other property of the plaintiff, which was attached at the same time. The jury were charged, that if they were only used in removing the other property, and were not injured or lessened in value thereby, such use would not make the defendants trespassers *ab initio*.

It was an early doctrine of the common law, that when a party was guilty of an abuse of authority given by the law, he became a trespasser *ab initio*, and lost the protection of the authority, under which he originally acted,—as, if beasts, taken *damage feasant*, or distrained for rent, were killed, or put to work, by the party taking them, he might be sued in trespass as for an original wrongful taking. This doctrine has fully obtained in this country, and was acted upon by this court in the case of Lamb v. Day et al., 8 Vt. 407, where it was held, that the defendants, who had attached the plaintiff's mare (one being creditor and the other officer) and worked her for several weeks in running a line of stages, without the plaintiff's consent, became trespassers *ab initio*. The doctrine has, to our knowledge, never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on the part of the defendants. Were the acts of the defendants, in using the horse, wagon and harness under the circumstances and for the purpose mentioned in this case, such an abuse of the property and of the authority under which it was taken, as ought to deprive them of the benefit of its protection?

It was the duty of the officer to remove the property, in order to make his attachment effectual, and the expense of such removal must be borne by the debtor; and instead of the plaintiff being injured by the use of the property, he was really benefited by it. The doctrine, for which the plaintiff contends, goes the extent of saying, that any use of the property makes the officer a trespasser;—so that if an officer attach a horse and wagon, and use the horse for the purpose of drawing away the wagon from the possession of the debtor, he becomes a tort feasor. We are wholly unable to satisfy ourselves, that the law has ever gone to so unreasonable an *237 extent, or *has ever been applied to any case, except those where the property has been injured, or has been used by the officer for his own benefit, or for the benefit of some one other than the debtor. This was the rule laid down by the county court, and we are fully satisfied of its correctness.

2. The next question arises upon the charge to the jury in relation to the driving of the horse and wagon by the officer on the next day after the attachment. The case states, that the officer was seen driving the horse and wagon in the highway,

but upon what business did not appear. The jury were charged, that if they found, that the officer was using the horse and wagon for other purposes, than that of removing and securing them in a place for conveniently keeping them, while under the attachment, the defendants would be liable,—otherwise not.

The officer, no doubt, had the right to drive the horse and wagon for the purpose suggested in the charge; but the plaintiff claims, that the legal presumption should be, in the absence of express proof as to the object and purpose of driving the horse and wagon, that it was for an unlawful purpose. But in our opinion this would be contrary to the ordinary rule of legal presumption in relation to all persons, and especially persons acting under legal authority. *Omnia præsumuntur rite acta* is a maxim, which is always applied to the conduct of persons acting under the authority of law. Although there was no direct evidence as to the object and purpose of driving the horse and wagon, the jury might well infer the object from the time, circumstances and direction of the driving; and we think it was properly left to them to determine. We think, it was upon the plaintiff to show the act of the officer to be unlawful; and if he had it left to the jury to decide, even without any evidence to prove it, we do not see, that he has any ground of complaint.

3. Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge the jury must have found, that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that, by the theory of the *238 law, whenever an invasion of *a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrong doer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrong doer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done,—because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed, that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession, is shown, and when not only all probable, but all possible, damage is expressly disproved.

The English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. In the case of Williams v. Mostyn, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and it was admitted, that the plaintiff had sustained no actual damage, or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for nominal damages. But, on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened, or injured, by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say, whether the plaintiff's reversionary interest had in point of fact been prejudiced. Young v. Spencer, 10 B. & C. 145, [21 E. C. L. 70.] Mr. Broome, in his recent work on Legal Maxims, lays down the law in the following language,—"Farther, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment *of tithes, the principle which *239 may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the parson of his full right."

If any farther authority is deemed necessary, in support of the ruling of the county court on this point, we have only to refer to that ancient and well established maxim,—*de minimis non curat lex*,—which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold out no inducement to useless or vindictive litigation. Sedgwick on Dam. 62. This disposes of all the questions raised upon the charge.

4. The remaining questions in the case arise upon the admission of the original files and record of the case Langdon v. Paul. The plaintiff objected to the introduction of the original record, and claimed, that the judgment could only be proved by an exemplified copy of the record. But we think the objection not well founded. If the clerk of the supreme court were willing to bring the original record into court, we think it might well be used. He probably could not be compelled to do so, and might have required the party to procure a copy of the same; but when the original record is brought into court, we think it would be very difficult to give any substantial reason, why it is not evidence of as high a character, as a copy of the same record would be. The practice of receiving original records as evidence has been universal, as we believe, in this state, and is often much more convenient than to procure copies. Nye et al. v. Kellam, 18 Vt. 594.

In relation to the amendment of the execution by the officer, it is very clear, that the county court had no power to permit any such amendment; but we cannot perceive, that the case was in any way affected by it. If the officer, who held the execution, was guilty of any irregularity in his proceedings in the sale of the wagon upon the execution, it could not have the effect to make these defendants trespassers, who took the property rightfully, and were in no way responsible for the act of the sheriff, who had the execution.

We find no error in the proceedings of the county court, and their judgment is affirmed.

NOTE. In Fullam v. Stearns, 30 Vt. 454, the question was whether a trespasser should be held liable for the value of certain thongs or strings, which were used to fasten together the ends of a leather belt, and which the trespasser had unnecessarily cut. The trial court had instructed the jury that if they found the thongs to be old, worn out, and nearly worthless, the defendant would not be liable unless he cut them wantonly. As to this, the supreme court, by BENNETT, J., said:

"We have more difficulty in relation to the manner in which the court put the case to the jury relative to the bands or belts. The case is not put to them upon the ground that it was necessary to cut the thongs with which the bands were laced or fastened together. It could not have so been, for the case says the evidence went to show that they could have been easily taken out without cutting.

"With reference to the value of the thongs, the case should have been put to the jury upon the ground that they found just what the defendants' testimony tended to prove, and nothing more, and that was 'that the thongs were considerably worn, and of small value.' The court were not warranted, upon such evidence, to put the case to the jury upon the hypothesis that they should find the thongs to be old, worn out, and nearly worthless. The court should have charged the jury as to what the law would have been had the jury found the thongs to have been 'considerably worn, and of small value.' Would the court, upon such a finding, apply the maxim, 'De minimis non curat lex'? While, on the one hand, we should be unwilling to hold out inducements to useless and vindictive litigation, we should, on the other, be slow to violate and set aside well-settled principles. To give a right of action, it has often been said there must be both an injury and a damage, and it has been as often said that every violation of a right imports some damage, and, if none other be proved, the law allows a nominal damage. See Whittemore v. Cutter, 1 Gallison, 429. The maxim, 'De minimis non curat lex,' I apprehend, whenever it is applied correctly to take away a right of recovery, has reference to the injury, and not to the resulting damage.

"If a person has a right to vote at an election, and he is refused this right, he may have his action, even though the person for whom he proposed to vote should chance to be elected. Ashby v. White, 2 Ld. Raym. 938. So, if a sheriff neglect to return an execution, the creditor may have his action for nominal damages, although no damage appeared to have resulted from the neglect. Kidder v. Barker, 18 Vt. 454. In the case of Clifton v. Hooper, 6 Adol. & E. (N. S.) 468, in an action for not executing a ca. sa., the jury found the defendant in default, but that the plaintiff had sustained no damage, and still judgment was given for the plaintiff for nominal damages. Lord Denman, in that case, said 'that where a clear right of a party was invaded, in consequence of another's breach of duty, he must be entitled to an action against that party for some amount, and that there was no authority to the contrary.'

"In Ashby v. White, 2 Ld. Raym. 938, it is said by Lord Holt 'that every injury to a right imports a damage in the nature of it, though there be no pecuniary loss.' See, also, Barker v. Green, 2 Bing. 317. The case of Williams v. Mostyn, 4 Mees. & W. 145, is not in conflict with Clifton v. Hooper. In that case the distinction between mesne and final process is well taken. In the case of mesne process, no right of the creditor is violated by an escape, unless he is delayed in his suit thereby, or has sustained actual damage. The creditor, it is said in that case, simply had the right to have the sheriff keep the prisoner ready to be removed at any time the plaintiff might elect, by habeas corpus, into the superior court, there to be charged with a declaration, or to be declared against as in the custody of the sheriff. The right of the plaintiff was correlative to the duty of the sheriff, and, unless the plaintiff was delayed in his suit by reason of the escape, no right of his had been violated; but, if delayed, though for ever so short a time, a right had been violated, and he has his action. See, also, Cady v. Huntington, 1 N. H. 138. So, in Young v. Spencer, 10 Barn. & C. 145, the action was by the person who had the reversionary interest against a lessee, and the court refused to allow nominal damages for a wrongful act of the lessee, which did not injure the estate in reversion. Here, also, no right of the reversioner was violated. A legal right must be violated, and a damage ensue; but actual, perceptible damages are not indispensable, and they will be presumed to follow. Embrey v. Owen, 6 Exch. 353, 372; Williams v. Esling, 4 Barr, 486. The maxim, 'De minimis non curat lex,' has been applied to claims for tithes, where the quantity was small, and involuntarily left upon the ground in the process of raking; yet, if there is a fraud, or an intention to deprive the person of his right, the maxim will not be applied to cut off his right of recovery, though the quantity be small, and in Glanvill v. Stacey, 6 Barn. & C. 543, the plaintiff had a judgment on his verdict for three shillings, and in Seneca Road Co. v. Auburn Railroad Co., 5 Hill, 175, it is said the maxim, 'De minimis,' etc., is never applied to a positive and wrongful invasion of another's property; and I apprehend it may at least be safe to say it should never in such cases be applied to cut off a recovery, where the positive and wrongful act causes damages which can be fairly valued. The damage done to the plaintiff's property by cutting his thongs, which fastened the bands together, though 'considerably worn, and of small value,' could be estimated, and we cannot say that he shall not recover them. In Paul v. Slason, 22 Vt. 235, the jury were charged that, if they found that it (the pitchfork) was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by its use, they were not bound to give the plaintiff damages for such use. The supreme court, it is true, affirmed this ruling, and applied the maxim, 'De minimis non curat lex,' to the case. It may be remarked that in that case the pitchfork was used in removing the plaintiff's hay, which had been attached, and which was to be removed at his expense; and it may, in one sense, be said that the fork was used in the business of the plaintiff, and for his benefit, and the jury must have found that the plaintiff had his fork again, and that it had not been injured by the officer in removing the hay. We apprehend that case does not warrant the charge of the court in the case at bar. Both the injury and the damage were too insignificant to be made the ground of an action. Indeed, the jury must have found there was no actual damage, and the court would not imply a damage from such a taking, though perhaps it might technically have constituted a wrongful taking by the officer, though taken to be used in removing the plaintiff's hay, and for the expense of which the plaintiff was to be charged."

WARTMAN v. SWINDELL.

(25 Atl. 356, 54 N. J. Law, 589.)

Court of Errors and Appeals of New Jersey. Nov. 14, 1892.

Error to circuit court, Camden county; before Justice Garrison.

Action by John W. Wartman against William H. Swindell for damages. Judgment for defendant. Plaintiff appeals. Reversed.

John W. Wartman, pro se. Scovel & Harris, for defendant in error.

VAN SYCKEL, J. In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the courthouse, and again demand the lines of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was done for when it was first done." When the plaintiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground de minimis non curat lex." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court. The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim de minimis non curat lex applicable to this case. In Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 175, Mr. Justice Cowen said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated Six Carpenters' Case, reported in 8 Coke, 432, involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable. In my opinion, the trial court erred in dismissing this case, and the judgment below should therefore be reversed.

DAYTON v. PARKE et al.[1]

(37 N. E. 642, 142 N. Y. 391.)

Court of Appeals of New York. June 5, 1894.

Appeal from supreme court, general term, second department.

Action by William B. Dayton against William A. Parke and others to recover freight and demurrage charges. From a judgment of the general term (22 N. Y. Supp. 613) modifying a judgment for plaintiff, defendants appeal. Modified.

Edward M. Shepard, for appellants. Thos. J. Ritch, Jr., for respondent.

PECKHAM, J. The trial court directed a verdict for the amount of the plaintiff's claim for freight, together with six cents damages, for demurrage, and the judgment was thus duly entered, with costs. Both parties appealed, and the general term, upon plaintiff's appeal, modified the judgment by increasing the amount allowed plaintiff for demurrage from 6 cents to $312, and it affirmed the judgment upon defendants' appeal. The defendants have appealed here from the judgment as so modified, and also from several orders relating to costs, and to the amendment of the judgment as to the amount that should be directed upon the plaintiff's claim for freight. [The court then held defendants liable for freight, but not for demurrage, as such, under the terms of the bill of lading.]

We come, then, to the question of liability of defendants, as consignees and presumed owners of the ties, for the payment of damages in the nature of demurrage for an improper detention of the vessel. On this branch the plaintiff has wholly failed to prove any damage whatever. Because the defendants might have been liable to pay those damages which the plaintiff might have proved if he had sustained them is no reason for allowing the plaintiff to recover even a nominal sum by way of damages, when no amount of damages whatever has been proved. The plaintiff chose to plant himself upon his alleged right to recover "demurrage," technically so called; and for that purpose he refers to the bill of lading and charter party as forming a contract on defendants' part to pay a certain sum daily for each day's detention proved beyond the number allowed in the charter party. This claim, as we have seen, he cannot make good, and there is no reason why he should be permitted to recover even a small sum unproved, especially when the effect might be to saddle costs of the litigation, otherwise payable by plaintiff, upon the shoulders of the defendants. The plaintiff says he was entitled to a recovery of six cents, if for no other reason than to establish a principle. I see no principle that is established by such a judgment. In an action of trespass upon real estate, where title comes in question, it is easily understood that a verdict of six cents may be of the greatest value to plaintiff as establishing his title to the land, so far at least as the defendant is concerned. No such principle obtains or can obtain in such an action as this. The cause of action of plaintiff in such a case consists of two branches,—one to establish an unjust or unreasonable detention by defendant, and the other to show the damages which plaintiff sustains by reason of such detention. A failure to prove either fact—unlawful detention or damage ensuing—is a failure to prove a cause of action; and a plaintiff, in failing to prove any damage whatever, is not entitled to a judgment for nominal damages. It is not a case where the law will presume damage. It is a fact to be proved.

We think the best that can be done in this case is to reverse the judgment, and grant a new trial, costs to abide the event, unless the plaintiff shall consent to reduce the judgment by striking out any recovery whatever for demurrage. In case such consent shall be given, then judgment shall stand for the reduced amount, subject to any further reduction, if any shall be allowed by the decision of the court upon defendants' application for costs by reason of the offer made by them. No costs on this appeal are allowed to either party in case the judgment is affirmed by consent of plaintiff as reduced, and in that case the order denying motion to modify verdict is affirmed. The order denying defendants' application for taxation of costs must, in event of affirmance of the judgment by consent, be reversed, with leave to defendants to renew such motion upon the facts as now existing. Judgment will accordingly be entered in accordance with this opinion. All concur. Judgment accordingly.

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[1] Portion of opinion omitted.

JONES v. KING.

(33 Wis. 422.)

Supreme Court of Wisconsin. June Term, 1873.

J. F. McMullen, for appellant. E. L. Browne, for respondent.

LYON, J. This is an action for slander. The complaint charges the speaking by the defendant, to and concerning the plaintiff, of certain slanderous words, imputing to the latter the committing of divers criminal offenses. The defendant, by his answer, denies the speaking of some of the slanderous words set out in the complaint, and admits the speaking of others of them, and alleges, by way of mitigation, that the plaintiff provoked him, by charging him with crime, and by applying to him grossly insulting epithets, to utter the language complained of. The evidence shows that the parties casually met, and engaged in a conversation, which at first was reasonably good-natured, but soon became an angry verbal altercation, in which vile epithets and charges of crime were freely hurled by each at the other. It will serve no useful purpose to state the testimony in detail, or to inquire which of the parties was most to blame. It is better for them both that we forbear to spread upon this record the particulars of their foolish and disgraceful encounter. Some objections on behalf of the plaintiff were made to the admission of testimony, and overruled; but they relate mainly to unimportant matters, and are not mentioned in the brief of counsel for the plaintiff. Considering that they are abandoned, no further notice will be taken of them. No valid exception was taken to the charge of the court, and no objection is made in the argument to its correctness. It should also be stated that considerable testimony was given tending to impeach the character of the plaintiff. The jury returned a verdict for the defendant, upon which, after a motion for a new trial had been overruled, judgment was rendered dismissing the complaint, with costs.

The plaintiff appeals, and his counsel claims that there should have been a verdict for nominal damages, at least, which, while it would have only carried nominal costs for the plaintiff, would have defeated the defendant's rights to recover costs. The claim of the learned counsel is doubtless correct. The speaking of words by the defendant, to and concerning the plaintiff, imputing to him a criminal offense, as charged in the complaint, is admitted by the answer. The plaintiff was therefore entitled to a verdict for at least nominal damages, without introducing any testimony, and without regard to the testimony which was introduced on the trial; and such verdict would have defeated the recovery of costs by the defendant. It should be observed that the circuit judge was not asked to charge, and did not directly charge, the jury that the plaintiff was entitled to a verdict for some damages. He did not say to the jury (as he well might) that the answer of the defendant admits, and also that the undisputed testimony proved, that actionable words were spoken by the defendant to and concerning the plaintiff, as alleged in the complaint. But the judge, in his charge, more than once refers to the speaking of such words, hypothetically. His language is, "If the words were spoken," and the like. Hence the verdict is not in disregard of the instructions of the court. It must also be observed that evidence of express malice on the part of the defendant seems to be entirely wanting in the case. In view of this fact, and of the uncontradicted testimony on certain other points (which it is unnecessary to specify), we are perfectly well satisfied that the plaintiff should have recovered no more than nominal damages. Indeed, we do not understand his counsel to claim that he is entitled to anything beyond that. We have before us, then, an action for slander, in which the verdict was for the defendant, but should have been for the plaintiff for nominal damages only, and in which it is not claimed that any rule of law has been violated by the court, in admitting or rejecting testimony, or in the instructions to the jury, or that the jury have disregarded the instructions of the court, or have behaved improperly. From these data we are to determine whether the plaintiff is entitled to a new trial of his action.

In Laubenheimer v. Mann, 19 Wis. 519, it was held that a judgment of nonsuit, although erroneous, will not be reversed, if it appear that the plaintiff is only entitled to nominal damages, if the case be one in which the defendant would recover costs, notwithstanding there is a judgment for nominal damages rendered against him. That was an action for a penalty, and was within the jurisdiction of a justice of the peace. Hence, had the plaintiff recovered nominal damages, the defendant would have been entitled to costs, the same as upon a nonsuit. In Mecklem v. Blake, 22 Wis. 495, which was an action to recover damages for alleged breaches of the covenants of seisin and against incumbrances in a deed of land, the court followed the decision in Laubenheimer v. Mann, and refused to reverse a judgment dismissing the complaint, although it appeared that the plaintiff was entitled to recover, but only to recover nominal damages. The fact was entirely overlooked that such damages, in that action, would have entitled the plaintiff to costs. Hence, in Eaton v. Lyman, 30 Wis. 42 (which was also an action on the covenants contained in a conveyance of real estate), Mecklem v. Blake was overruled as to the point we are considering; and, it appearing that the plaintiff was entitled to nominal damages, we reversed a judgment of nonsuit against them. We are entirely satisfied with this decision, and believe that it establishes the correct rule in all actions sounding in contract to which it is applicable. But there is a class of actions denominated in the books "hard actions," to which a different rule has been applied in numerous cases. Of these actions, and of the rules relating to new trials which are applicable to them, a learned author says: "Hard actions strictly include only civil proceedings, involving in their nature some peculiar hardship, arising from the odium attached to the alleged offense, or the severity of the punishment which the law inflicts on the offender in the shape of damages. To this belong most actions arising ex delicto. Trespass, slander, libel, seduction, malicious prosecution, criminal conversation, deceit, gross negligence, actions upon the statute, or qui tam actions, prosecuted by informers, and penal actions, prosecuted by special public bodies or the public at large, are ranged under this head. But as they partake, less or more, in their nature and effect, of prosecutions for criminal offenses, the rules that govern in granting or refusing new trials, and the reason of those rules, are drawn from criminal cases, rather than civil." 1 Grah. & W. New Tr. p. 503, c. 14. It is scarcely necessary to say that in criminal prosecutions, after trial and verdict for the defendant, a new trial is never granted. But the rule is not as broad in the class of civil actions mentioned above; yet in those actions it is much broader in favor of defendants than in other civil actions. In the volume last above cited, we find the following statement: "It is a general rule, with but few exceptions, that in penal, and what are denominated 'hard actions,' the court will not set aside the verdict, if for the defendant, although there may have been a departure from strict law in the finding of the jury." Page 353. And, again, on page 523: "In hard actions, a new trial will not be granted, especially if the verdict be for the defendant, although against evidence, nor unless some rule of law be violated." The author proves the correctness of the principles and rules thus laid down by him, by references to large numbers of cases, both English and American; and he satisfactorily demonstrates that, in a case like the present one, a new trial cannot be granted without a violation of well-settled rules of law. Perhaps as satisfactory a statement of the law on this subject as can be found is contained in Jarvis v. Hatheway, 3 Johns. 180. Judge Spencer there says: "In penal actions, in actions for a libel and for defamation, and other actions vindictive in their nature, unless some rule of law be violated in the admission or rejection of evidence, or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success." Add to these other conditions which exist in this case, to wit, that, at the most, the plaintiff is only entitled to recover nominal damages, and that the jury have not disregarded the instructions of the court, and there can be no doubt whatever that the motion for a new trial was properly denied by the court below. Our conclusion is that the judgment of the circuit court must be affirmed. Judgment affirmed.

SPOKANE TRUCK & DRAY CO. v. HOEFER et ux.

(25 Pac. 1072, 2 Wash. 45.)

Supreme Court of Washington. Feb. 5, 1891.

Appeal from superior court, Spokane county.

Turner & Graves, for appellant. Jesse Arthur, for appellees.

DUNBAR, J. The plaintiff Mina Hoefer had her arm broken, and was otherwise injured, by the falling of a safe, which was being hoisted by the defendant into a five-story brick building, known as the "Eagle Block," in the city of Spokane Falls. Plaintiff had been to the office of her physician, in the second story of said building, where she was accustomed to go for treatment daily, and while returning from such a visit on the 7th day of February, 1890, she passed down the stairway, and into the court or opening under the hoisted safe just as it fell. The said stairway started from the entrance of said court or well on Stevens street, and landed on the north end of the covered way on the second floor of the rear building. Dr. Thiel's office, where Mina Hoefer had been just before she was injured, was in a room on the second floor of the Stevens-Street building, and was the first room north of the Stevens-Street entrance. There was one other and perhaps main entrance to the building from Riverside avenue, and it is claimed by the defendant that the court or well on that side of the block was used for hoisting heavy articles to the upper stories of the building, and was not generally employed by the public as an entrance to the upper stories of the block; yet we think it fairly appears that the stairway leading from Stevens street was in common use, and that the plaintiff had a right to use it in going to and from the office of her physician. Suit was brought against the defendant, alleging damages in the sum of $5,000. The case was tried by a jury, and a verdict rendered for plaintiffs for $2,500, and a judgment rendered for the same, from which judgment an appeal was taken to this court.

The defendant assigns as error the following instructions to the jury, given by the court upon its own motion: "Furthermore, gentlemen, the plaintiffs claim in this action that the defendant was not only guilty of negligence, by reason of which the plaintiff was damaged, but was guilty of gross negligence, and, in case you find they were guilty of gross negligence, a different rule of damages applies to the case." " 'Gross negligence' means a wanton and reckless disregard of the rights of other persons taken into consideration with the facts in the case; and, in case you find that it was, then, in addition to the actual damages which you may find for plaintiff, you may assess a sum which the law calls 'exemplary damages.' That means a damage to deter others from being wanton and reckless of the rights of others." Also the following instructions asked by plaintiffs: "If the jury believe from all the evidence that the agent and employés of defendant, the Spokane Truck & Dray Company, in placing the beams and planks across the well-hole, in plaintiffs' petition mentioned as being in the Eagle block, in the city of Spokane Falls, and in any other way, in the construction and preparation of the appliances, for hoisting the safe up and through said well-hole, and, in the hoisting of the same, failed to use such care as the nature of the employment, and the situation and circumstances surrounding the same, required of a prudent person, having had experience, and skilled in such or similar work, and that, by reason thereof, said beam and planks, and other appliances, in the attempt to hoist said safe, gave way or were broken, and fell down through said well-hole, striking plaintiff Mina Hoefer, breaking her arm, and otherwise injuring her, they should find for plaintiff, assessing the damage, if any, at such sum as they find she has sustained, not exceeding $5,000, the amount claimed in the complaint." "The jury is instructed that, if they find for plaintiff under the preceding instruction, in assessing the damage they have a right to consider and allow for the loss of the personal services of plaintiff Mina Hoefer to her family; her mental suffering and bodily pain; the extent of probable duration of the injury; and the prospective loss of service occasioned thereby; also the expense incurred for medicine, nursing, etc., and such reasonable doctor bill as plaintiffs were obligated to pay." "Should the jury find for plaintiffs under instruction No. 1, and also find that defendant's agents and employés, in constructing the appliances for hoisting said safe, and in hoisting the same, were guilty of gross negligence, that is, exercised so little care as to evince a reckless and willful indifference to the safety of plaintiff Mina Hoefer, and all others using said entrance and stairway, then they may find for plaintiffs exemplary damages; that is, damages in money by way of punishment, in addition to the damages they may find under instruction No. 2, in no case exceeding in all the amount of $5,000 claimed in the complaint." The court refused to give the following instruction asked by the defendant, which refusal defendant also assigns as error: "If you find by the evidence that the injury occurred by defects in the wall, caused by the elements, and such defects were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover." So far as the instruction is concerned that was asked for by defendant and refused by the court, we think it had already been substantially given by the court; and it was not necessary to repeat it in another form of words. The court had already instructed the jury that "if it did not appear by a preponderance of testimony that this injury was occasioned by the negligence of the defendant, that it was their duty to find for the defendant." Courts should not be called upon to particularize by referring to certain portions of the testimony. It is a far safer rule to state the law governing the case in general terms.

It is claimed by the defendant that the language used by the court in the first instruction asked by plaintiffs makes the defendant an actual insurer of the safety of the public, and is therefore erroneous. The statement was "that the defendant was bound to use such care as the nature of the employment and the situation and circumstances surrounding the same required of a prudent person having had experience, and skilled in such or similar work." We are unable to see how this instruction could be materially modified. Undoubtedly the "nature of the employment" must be taken into consideration. If it is an employment which is likely to endanger life or property, certainly a greater degree of care would be required than an employment, the careless performance of which would not ordinarily result in injury to person or property. It is plain that "the situation and circumstances surrounding the employment" must be considered; for, applying the rule to a case of this character, a person in hoisting a heavy weight in an unfrequented place, in no way connected with any thoroughfare or passage-way, would not be held to the same degree of care as he would be if the work were being done in a public thoroughfare, where people had a right to pass, and were actually constantly passing. It certainly cannot be gainsaid that "prudence" should be one of the requisite qualifications of a person engaged in such employment. Nor must his qualifications stop here, when engaged in a business which is liable to injuriously affect the public; for he might be an ordinarily prudent man, and yet, if he had no experience or skill in the particular work in which he is engaged, disastrous results would be liable to follow. Language which is not technical must be construed by its ordinarily accepted meaning, and we do not think that the language employed by the court could be so construed as to make the defendant an insurer; and we concur with the counsel for the plaintiffs that it states substantially the same doctrine as the quotation from Shear. & R. Neg. § 47, by defendant, where they define ordinary care, to be "the care usually bestowed upon the matter in hand by persons accustomed to deal with such matters, and having the prudence of the general class of society to which the person whose conduct is in question belongs."

We next pass to the instruction of the court both upon its own motion and upon the motion of the plaintiffs in relation to punitive damages. This is a question which has engaged the earnest attention of courts and authors. A careful investigation of the discussion of this subject by such noted authors as Greenleaf, Sedgwick, and Parsons, and also other eminent text-writers, and by numerous courts, shows a wonderful diversity of opinion on this interesting subject. The weight of authority, especially considering the older cases, seems to be in favor of the doctrine of punitive damages, but the opposite doctrine has received the support and advocacy of many modern writers, and the judicial sanction of many modern courts; while other courts have frankly stated their repugnance to the doctrine, yet considered themselves bound, by former decisions in their respective states, to still maintain it, appealing to the legislature to relieve them from what they believe to be a pernicious practice. In this state it is a new question, and the court approaches its investigation untrammeled by former decisions, free to accept the reasoning which most strongly appeals to its judgment, and to adopt the rule which, in its opinion, will simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder. And this desired ultimatum, we think, will best be attained by adopting the rule laid down by Mr. Greenleaf (volume 2, § 253) that "damages are given as a compensation or satisfaction to the plaintiff for an injury actually sustained by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or his estate,"—although it is stoutly maintained by so eminent an author as Mr. Sedgwick that this definition is too limited, and that, "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." 1 Sedg. Dam. p. 38; Id. (7th Ed.) p. 53. It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions "from the time whereof the memory of man runneth not to the contrary," are absolutely ignored. Under this procedure the doctrine of presumption of innocence, until proven guilty beyond a reasonable doubt, finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited, save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages, on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence. Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, laceration of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. Ordinarily the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure, and by rules governing the admission and weight of testimony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights; there its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal, and not the civil, jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and controlling its criminals, and as fines are imposed for the double purpose of restraining the offender, and of reimbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff who has already been fully compensated, a theory which is repugnant to every sense of justice.

Again, while jurors should be the judges of the character and weight of testimony, that judgment should be exercised under some rule, and be amenable to some law, so that an abuse of discretion could be ascertained and corrected; but, under the doctrine of punitive damages, where the whole question is left to the unguided judgment of the jury, and where, under the very nature of the doctrine, no measure of damages can be stated, and hence no limits compelled, where there are no special findings provided for, it would not be often that a court would be warranted in interfering with a verdict, if indeed it could do so at all, if the verdict fell within the amount asked as compensatory damages. Take the case at bar for instance, and the court has no way of ascertaining whether the jury found that the plaintiff had actually been damaged to the full amount of $2,500, or whether they found her actual damages to be $500, and assessed the other $2,000 by way of punishment. It seems to us that a practice which leads to so much confusion and uncertainty in the administration of the law, and that is always liable to lead to injustice, the correction of which is impracticable, cannot be too speedily eradicated from our system of jurisprudence. In this connection, we quote approvingly the language of the supreme court of Indiana in Stewart v. Maddox, 63 Ind. 51. Says the court: "The doctrine of exemplary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and in a case where the defendant is a commanding, popular, influential person, and the plaintiff of an opposite character, and the local and temporary excitement of the time happens to be in favor of the defendant, the jury is apt to be reluctant in giving even pecuniary compensation, without adding anything by way of exemplary or punitive damages; while, in a case in which the character of the parties and the circumstances are reversed, the jury will be liable to push their powers to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights." Says the court in Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119: "The reflecting lawyer is naturally curious to account for this 'heresy' or 'deformity,' as it has been termed. Able and searching investigations made by both jurists and writers disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherforth; that it was not recognized in the earlier English cases; that the supreme courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other states have falteringly retained it because committed so to do; that a few years ago it was correctly said, 'At last accounts the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr. Chief Justice Quain declared to be "utterly inconsistent propositions;" ' and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases." And in support of this theory the Colorado court quotes Mr. Justice Foster in Fay v. Parker, 53 N. H. 342, who concludes a discussion of the expression "smart money" as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term 'smart money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart." Some courts have held that it was in violation of the constitutional guaranty "that no person should be twice put in jeopardy for the same offense," where the criminal code provided a punishment for the same offense, and some have restricted or limited its abrogation to cases where the act charged to have been committed was made punishable by law; but, without expressing any opinion on the constitutional question, we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice, and that the instruction of the court on the subject of punitive damages was erroneous. With this view of the law it is not necessary to examine the further objection urged by defendant, "that this was not a proper case for the application of the doctrine of punitive damages." The judgment is reversed, and the case remanded for a new trial.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

LUCAS v. MICHIGAN CENT. R. CO.

(56 N. W. 1039, 98 Mich. 1.)

Supreme Court of Michigan. Dec. 4, 1893.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by Calvin Lucas against the Michigan Central Railroad Company for damages for wrongful ejection from defendant's train. Judgment for plaintiff, and defendant brings error. Reversed.

Henry Russel, (Ashley Pond, of counsel,) for appellant. Dickinson, Thurber & Stevenson, for appellee.

McGRATH, J. Plaintiff purchased an excursion ticket at Dexter, good to Detroit and return, and rode to Detroit thereon. At about 8 o'clock on the evening of the same day he took the train at Detroit for Dexter, taking a seat in the smoking car. When a few miles out of Detroit, the conductor took up his ticket. When the train arrived at Ypsilanti, plaintiff left the smoker, and took a seat in a regular passenger car. After the train left Ypsilanti, the conductor came to plaintiff, and demanded his fare. Plaintiff informed him that he had given him his ticket in the other car. The conductor then asked him for his check. Plaintiff replied that he had not been given a check. The conductor threatened to put him off, but did not at that time, but told him that he would have to pay his fare, or get off at Ann Arbor. Plaintiff responded that he had surrendered his ticket, and would not pay his fare. After the train left Ann Arbor, the conductor returned, and, plaintiff refusing to pay his fare, the conductor called the brakeman, and they together pulled plaintiff from his seat, took him through the car, and put him off, about one mile west of Ann Arbor and eight miles east of Dexter. Plaintiff testified that when his ticket was taken up no check was given him; that when the conductor came to him the second time, and again just before he was put off, he told the conductor that if he would go back with him into the smoking car he would prove his assertions by the man who sat with him, but that the conductor told him that he had no time to bother with him; that the conductor insisted that he (plaintiff) had gotten on at Ypsilanti; that he was ejected from the car by force at about 10 o'clock at night; that the night was very dark; that he could not even see the fences on either side of the track, and that he was compelled to walk home. It was not claimed on the trial that plaintiff had not surrendered a ticket, but the conductor insisted that he had given him and all of the excursionists checks; that he told plaintiff that if he would bring one man that knew him, that said he came from Detroit, it would be all right, but he would not do that; that he used no force in ejecting him; and denied that plaintiff had requested him to go into the smoking car for the purpose of identification. One of plaintiff's witnesses, who was in the smoker, testified that the conductor gave plaintiff no check when the ticket was taken up. Another witness, who was in the car from which plaintiff was ejected, testified that she was an excursionist, as were others who were with her; that no checks were given to her or the other excursionist with her, and that she heard plaintiff say to the conductor that if he would go into the smoking car with him (plaintiff) he could prove that he got on at Detroit, and had given up his ticket, and the conductor refused to go. Plaintiff had a verdict for $1,200, and defendant appeals.

The alleged errors relate to the refusal of requests to charge, and to the instructions given on the question of damages. The defendant was entitled to have the jury instructed as to the law applicable to its version of the case. After the surrender of his ticket, plaintiff had left his seat in the smoking car, and taken a seat in another car. If plaintiff received a check from the conductor, and, when his fare was demanded, did not produce the check, and, when requested, refused to go into the other car for identification, he could not recover. The check, if given, was given him for the very purpose of identification. It was notice to him that the conductor would rely upon its production, and not upon recollection. The defendant was entitled to the instruction that there was no evidence of malicious intention on the part of the conductor; but, under the circumstances of this case, if the jury believed the testimony introduced on behalf of plaintiff, the plaintiff was entitled to recover, not only those damages, which are ordinarily termed "actual damages," but for whatever injury to his feelings or of indignity, pain, and disgrace such conduct would tend to produce in view of the time, place, and circumstances. Conduct may be so hasty and ill-timed, and so far disregard proper precaution and the rights of others, as to be reckless and oppressive, and the law regards recklessness and oppression as aggravating the injury. Post Co. v. McArthur, 16 Mich. 453; Josselyn v. McAllister, 22 Mich. 310; Kreiter v. Nichols, 28 Mich. 499; Elliott v. Herz, 29 Mich. 202; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695. If plaintiff's legal rights were violated by the expulsion from the train, it was for the jury to consider the injury to his feelings that such conduct would be likely to produce, in view of his consciousness that he was without fault, and had a right to remain upon the train to his destination. Railroad Co. v. Flagg, 43 Ill. 364; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49; Railroad Co. v. Rice, 64 Md. 63, 21 Atl. 97; Railroad Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837. It was expressly held in Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356, that if plaintiff was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion, and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company. Defendant's belief cannot be held to justify unreasonable or reckless conduct. Welch v. Ware, 32 Mich. 77; Raynor v. Nims, 37 Mich. 34.

The court was in error, however, in instructing the jury that plaintiff was entitled to exemplary damages in the absence of any explanation as to what was meant by that term. Post Co. v. McArthur, supra. The court had already instructed the jury that plaintiff was entitled to recover as actual damages "for such pain and mortification and disgrace as the act entailed," and then informed the jury that if plaintiff made a proposition to the conductor to step back into the other car, and allow him to prove that he got on at Detroit, and surrendered his ticket, then he was entitled to recover, in addition to his actual damages, what the law calls "exemplary damages." The jury were left free to add to the amount which they found that plaintiff had suffered from mortification, pain, and disgrace a further sum as a punishment. The aim of law which gives redress for private wrongs is compensation to the injured, rather than the prevention of a recurrence of the wrong. The law recognizes the fact that an injury may be intensified by the malice or willfulness or oppressiveness or recklessness of the act, and simply allows damages commensurate with the injury when these elements are present. The added injury in consequence of their presence is not always susceptible of proof, hence the matter is left to the sound discretion of the jury. Courts, however, should call attention to the elements that should be considered by juries in this class of cases, and caution them from acting upon improper theories. Josselyn v. McAllister, 22 Mich. 310; Scripps v. Reilly, 38 Mich. 10; Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81. It is urged that the defendant is not liable in exemplary damages for the oppressive or reckless conduct of the conductor, and Railroad Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, is relied upon. In that case the act was wholly without the line or scope of the conductor's authority, and the court expressly recognize the rule that, if any wantonness or mischief on the part of an agent acting within the scope of his employment causes additional injury to the plaintiff in body or mind, the principal is liable to make compensation for the whole injury suffered, and a number of cases are cited in support of the doctrine. For the errors mentioned, the judgment is reversed, and a new trial ordered. The other justices concurred.

CHELLIS v. CHAPMAN.[1]

(26 N. E. 308, 125 N. Y. 214.)

Court of Appeals of New York. Jan. 13, 1891.

Appeal from supreme court, general term, fourth department.

Watson M. Rogers, for appellant. *Hannibal Smith*, for respondent.

GRAY, J. This plaintiff has recovered a verdict for $8,000, as damages for the breach by defendant of his promise to marry her. The proofs abundantly justified the jury in finding as they did, but the defendant insists that the trial judge erred in his rulings upon the evidence, and in his charge. He does not raise any question about the fact of his agreement to marry the plaintiff, and, indeed, he could not well do so, as it was established out of his own mouth; but he thinks his case was prejudiced by the admission of certain evidence, and by the way in which the trial judge submitted the question of the damages to the consideration of the jury, and that he should, therefore, have a new trial. The general term, in affirming the judgment, have passed upon various points raised by the appellant, and we might well remit the case without further expression of opinion; but some of the questions still insisted upon seem to deserve further consideration from us. Evidence of the defendant's general reputation as to wealth, at the time of the agreement of marriage, was admitted against the objection to its competency upon the subject of damages in such an action. The exception to its admission presents an interesting question, and one which may be deemed not altogether free from difficulty. Such evidence, on first consideration, seems to conflict with the general rule that in actions for a breach of contract evidence as to the defendant's wealth is inadmissible. The plaintiff, in such actions, is entitled to recover only those damages which she may prove that she has suffered in consequence of the defendant's failure to perform on his part. The defendant's solvency, or insolvency, has nothing to do with the issue, and furnishes no measure for the computation of damages. And this rule of exclusion as to such evidence has been also applied to cases where damages are sought to be recovered for seduction, or for criminal conversation. James v. Biddington, 6 Car. & P. 589; Dain v. Wycoff, 7 N. Y. 191. Baron ALDERSON, in James v. Biddington, an action by a husband for criminal conversation with his wife, assigned as the reason for holding such evidence to be improper that "the plaintiff is entitled to as much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the case." Judge GARDINER, in Dain v. Wycoff, an action by a father for the seduction of his daughter, reasoned, upon the exclusion of proof of what defendant was worth, that the jury should not be allowed "to go beyond the issue between the parties litigating, and, after indemnifying the plaintiff for the injury sustained by him, proceed as conservators of the public morals to punish the defendant in a private action for an offense against society." The principle underlying the exclusion of this kind of evidence, in the latter class of cases, is that vindictive or punitive damages would be improper, as the recovery in them should be confined to what the jury may deem to be a sufficient compensation for the injury sustained by the plaintiff. But the present action is quite other in its nature, and constitutes an exception to that general rule upon the subject of damages for violation of contract obligations which has been assented to by the judges of the courts in this country and in England. It is apparent that, in such an action as this, there can be no hard and fast rule of damages, and that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be independent of a consideration of the evidence. It is one which is to be exercised with regard to all the circumstances of the particular case, and, as it has frequently been said, where the verdict has not been influenced by prejudice, passion, or corruption, the verdict will not be disturbed by the court. That the amount of the suitor's pecuniary means is a factor of some importance in the case of a demand of marriage cannot fairly be denied. It is a circumstance which very frequently must have its particular influence upon the mind of the woman in determining the question of consent or refusal; and, as I think, in a proper case, very naturally and properly so. The ability of the man to support her in comfort, and the station in life which marriage with him holds forth, are matters which may be weighed in connection with an agreement to marry.

In the case at bar the plaintiff was 47 years of age, and the defendant 74. Six years previously he had sought her acquaintance, unsolicited by her, and with matrimonial views on his part. He had visited her more or less frequently, and had twice proposed marriage before their engagement in 1886. She was and had been supporting herself as a teacher and superintendent in city schools. He had never been married, and had lived in the country as a farmer. He was possessed of pecuniary means, considerable in amount in the general estimation of his neighbors, and not inconsiderable if we take his own estimate. Though pretending to some cultivation of mind, which, among other ways, if we may judge from this record, he seemed to delight in displaying by a versification of the homely though not very inspiring or romantic topics and events of his farm life and surroundings, he yet was seemingly lacking in those outward graces of the person which are not infrequently deemed a substitute for more solid possessions. Nor does he seem to have had recourse to the adventitious aids of the wardrobe to adorn his exterior person, and thereby to compensate for personal shortcomings. I think that the jury should be made aware of all the circumstances which in this case, and in every such case, might be supposed to have presented themselves to the mind of the plaintiff when asked to change her position by marriage. Of these circumstances, the home offered, which for its comforts and ease would depend upon the more or less ample pecuniary means of the defendant, the freedom from the personal exertions for daily support, the social position accompanying the marriage, all these are facts which have their proper bearing upon the question of marriage. The wealth and the reputation for wealth of a man are matters which, as this world is constituted, often aid in determining his social position, notwithstanding he may have other and more intelligible rights to it, and despite objectionable characteristics or traits. Where, therefore, the defendant has demanded an engagement of marriage, it seems proper enough that the jury should know what possible reinforcement his suit may have had, and what were the inducements offered by his social standing and surroundings. In the case of James v. Biddington, supra, Baron Alderson, while holding it improper to give evidence of the amount of defendant's property in an action for criminal conversation, said: "In a case of breach of promise of marriage, the amount of the defendant's property is very material, as showing what would have been the station of the plaintiff in society if the defendant had not broken his promise." And see Berry v. Da Costa, L. R. 1 C. P. 331; Wood v. Hurd, 2 Bing. N. C. 166. It has been so held in this court, and in the courts of other states, to some of whose decisions the respondent's brief has directed our attention. Kniffen v. McConnell, 30 N. Y. 285; Lawrence v. Cooke, 56 Me. 187; Bennett v. Beam, 42 Mich. 346, 4 N. W. Rep. 8; Allen v. Baker, 86 N. C. 91. In Mayne, Damages, (Wood's Ed. § 677,) upon the strength of the English authorities I have cited, the same rule is given. I apprehend, however, that the difficulty, in the question before us, of the evidence, is not so much in adducing proof as to defendant's pecuniary means, as in the mode of their proof. But assuming, as I think we are bound to do under the authorities, that the amount of defendant's property is material in such an action, then evidence of the reputation which he enjoys for wealth is unobjectionable. Reputation is the common knowledge of the community, and, if it is exaggerated or incorrect, the defendant has the opportunity to correct it, and of giving the exact facts upon the trial. The admission of the evidence is not to establish an ability to pay, but to show the social standing which defendant's means did, or might, command. In Kniffen v. McConnell, 30 N. Y. 289, which was an action for a breach of promise of marriage, Judge Ingraham, delivering the opinion of the court, held that "it may be objectionable to particularize the defendant's property, and such evidence should be confined to general reputation as to the circumstances of the defendant. To that extent I think it admissible." The learned judge does not reason upon the rule, but I am not aware that this decision has ever been questioned, and I do not think it well can be. In Kerfoot v. Marsden, 2 Fost. & F. 160, an action for breach of promise of marriage, in 1860, Wilde, B., ruled: "You may ask in a general way as to the defendant's property, but you cannot go into particular items as to his property." I think we must conclude upon authority, as well as upon the reason of the thing, that evidence of the reputation of the defendant as to wealth is admissible in these cases. The belief of the plaintiff must have been influenced by the opinions or beliefs of the members of the community in which the defendant resided. She could not be presumed to have personal cognizance of a matter, which is so peculiarly one within the individual's exclusive knowledge, and what credence she gave to general report was not without justification. She had some right to rely upon it. The action is intended as an indemnity for the temporal loss which the plaintiff has sustained, and that embraces the mortification to the feelings, the wounded pride, and all the disappointments from the failure of the marriage, as well in the losses it has occasioned as in the blow to the affections.

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[1] Affirming 7 N. Y. Supp. 78.

The appellant insists upon the error of the trial judge in submitting to the jury the question of exemplary damages. But we think, in such a case, that it is the province of the jury to determine upon the proof of the facts and of the surrounding circumstances what damages should be awarded. If the conduct of the defendant in violating his promise is characterized by a disregard of the plaintiff's feelings or reputation; if he has placed her, or induced her to place herself, in a false position, or to forego temporal advantages; if the breach of his promise is unjustifiable; if he spreads upon the record matters in defense of the action which are scandalous, and tend to reflect discredit upon the plaintiff, or stain her reputation,—then these are all circumstances which may be considered by the jury, and may be availed of by them to enhance the damages. Here the trial judge did not say in his charge that this was a case for the infliction of punitive damages. He instructed the jury, in substance, that if the plaintiff was entitled to damages they should certainly give compensatory damages, and that, in the exercise of their discretion based on the proofs and circumstances of the case, they might award exemplary or punitive damages. Upon this subject, of when such damages might be awarded, he read at length from the opinions of this court in Thorn v. Knapp, 42 N. Y. 474, and Johnson v. Jenkins, 24 N. Y. 252, for the purpose of showing the rule to be applied. It is clear that he left it to them to arrive at a decision upon the propriety of giving exemplary damages from a consideration of the defendant's motives and conduct. Now, there was evidence in the case upon which a verdict might well include exemplary damages. The wedding day was agreed upon, the usual preparations were made by the plaintiff, and relatives and guests were bidden to the ceremony. But the defendant did not appear. He alleged physical ailments in excuse of not fulfilling his marital engagement, but there was evidence that he was evading it, and shamming illness. He admits that he had no fault to find with her. She had resigned her position to marry him. He denies requesting her to do so; but his attempt at denial is weakened by his subsequent admission that he expected her to do it. Then, in his pleading, he charges the plaintiff with having no affection for him, but with entertaining a purpose to procure money from him, on the pretense of his promise to marry her, and his breach thereof. These were elements in the case which might properly enter into the decision of the jury as to the amount of damages.

The appellant alleges another error in the charge, when the trial judge instructed the jury: "In fixing the amount [of damages] the plaintiff is entitled at least to such damages as would place her in as good pecuniary condition as she would have been if the contract had been fulfilled." This was, of course, a careless use of language, but it could not have prejudiced the defendant's case. It was very plain from all the charge, in what preceded as in what immediately followed the sentence picked out for objection, that the trial judge intended to and did instruct his jury that they should compensate the plaintiff for what she had lost and was deprived of by the failure of the marriage. They might affix to the marriage with the defendant that pecuniary value which, in their judgment, upon all the circumstances of the case, it would have to the plaintiff. The jury could not reasonably have understood the judge otherwise. It may often occur in a charge to the jury that particular words or expressions used, when taken by themselves, will be objectionable or seem to be erroneous; but they should not be considered independently of contextual phrases. If, when read in connection with the rest of the charge, the sense of language used is made clear, and its meaning explained, and the instruction is not uncertain as to the subject-matter, the result of the trial should not be disturbed for mere inaccuracies or carelessness in speech. There is no occasion for a further discussion of any questions, and the judgment and order appealed from should be affirmed, with costs. All concur, except EARL and PECKHAM, JJ., who dissent, on the ground that it was error to receive proof of the defendant's wealth by reputation.

Judgment affirmed.

McINTYRE, Adm'r, v. SHOLTY, Adm'r.

(13 N. E. 239, 121 Ill. 660.)

Supreme Court of Illinois. Sept. 27, 1887.

Error to appellate court, Third district; O. T. Reeves, Judge.

Blades & Neville, for plaintiff in error. Kerrick, Lucas & Spencer and Tipton & Beaver, for defendant in error.

MAGRUDER, J. This is an action of trespass, brought by defendant in error against plaintiff in error, in the circuit court of McLean county, under the "Act requiring compensation for causing death by wrongful act, neglect, or default;" being chapter 70 of the Revised Statutes, entitled "Injuries." Hurd, Rev. St. 1885, p. 695. Jury was waived by agreement, and the case was tried without a jury before the judge of the circuit court, who gave judgment for the plaintiff for $2,500. This judgment has been affirmed by the appellate court, and is brought before us for review by writ of error to the latter court.

Hannah Sholty was the wife of Levi Sholty, a farmer living in McLean county, near Bloomington. About February 17, 1886, a working-man upon Levi Sholty's farm discovered a man in the barn, who, to all appearances, had been concealing himself there for some time. The person so concealed is proven to have been defendant's intestate, Benjamin D. Sholty, a brother of Levi Sholty. Some efforts seem to have been made on February 17th or 18th to get the officers of the law in Bloomington to go out to the farm and arrest Benjamin D. Sholty, called by the witness David Sholty. This effort, however, failed. Accordingly, Levi Sholty and his hired man, and a number of his neighbors, gathered at his house on the afternoon of February 18, 1886, for the purpose of watching for the intruder, and getting him out of his hiding-place. The barn was 40 or 50 feet wide, and from 80 to 100 feet long. It was situated about 150 or 200 feet north-west from the house. The granary was in the western end of the barn, and, hence, in the end that was furthest from the house. About 6 o'clock in the evening, David Sholty was discovered in the granary by his brother Levi and one McCoy, who were on watch just outside of the granary door. He shot at them twice with a pistol, while they were trying to prevent his escape, and to capture him. Others who were waiting in the house came to their assistance. A rope was obtained, with the intention of tying him, if captured. Presently there was a cry of fire, and the flames were seen to be breaking out at the eastern end of the barn, being the end nearest towards the house. At this time Mrs. Hannah Sholty, plaintiff's intestate, went from the house towards the barn, and had advanced about half of the distance between the two, when David Sholty appeared in the door at the eastern end of the barn, with a shot-gun. He was plainly visible in the light made by the fire that had broken out. He called upon Mrs. Sholty and her daughter Mary, who was with her, to stop. They stopped, turned, and had advanced a few feet on their way back towards the house, when David Sholty fired at them with the gun in his hand. Both were shot. The daughter was wounded in the wrist, and the mother was killed. This action is brought by her husband, as administrator of her estate, to recover damages for her death, against the administrator of the estate of David Sholty, who is said to have perished in the flames of the burning barn.

The defendant introduced no testimony, except that the examination of one witness was begun, and abandoned, after a few preliminary questions, on account of the ruling of the court as hereafter stated. The defense proposed to show by the witness on the stand, and by others there present in court, that defendant's intestate, Benjamin D. Sholty, was insane at the time Mrs. Sholty was killed. The court refused to receive evidence of his insanity, and exception was taken to the ruling. The question presented relates to the liability of an insane person for injuries committed by him.

It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism, on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle that in trespass the intent is not conclusive. Mr. Sedgwick, in his work on Damages, (marg. page 456,) says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to his view, however, is a majority of the decisions and text writers. There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted by a lunatic. He has properly no will. His acts lack the element of intent, or intention. Hence it would seem to follow that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrong-doers. There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid, for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives, or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity, with a view of masking the malice and revenge of an evil heart. The views here expressed are sustained by the following authorities: Cooley, Torts, 99–103; 2 Saund. Pl. & Ev. 318; Shear. & R. Neg. § 57; Weaver v. Ward, Hob. 134; Morse v. Crawford, 17 Vt. 499; Behrens v. McKenzie, 23 Iowa, 333; Krom v. Schoonmaker, 3 Barb. 647; also cases in note to said case, in Ewell, Lead. Cas. 642. In the light of the principles thus announced we find no error in the ruling of the circuit court upon this subject.

Plaintiff in error also contends that there should have been no recovery in this case because of alleged contributory negligence on the part of Mrs. Sholty. It is claimed that she knew of her brother-in-law's madness, and that he was armed, when she started to go from the house towards the stable; and that by doing so, under the circumstances, she was guilty of a want of proper care and prudence. We forbear to express any opinion as to whether or not there could be any such thing as contributory negligence in a case of this kind, and under such circumstances as are herein disclosed. It is sufficient to say that there is a considerable amount of evidence in the case bearing upon this question. If it could be properly raised, the facts necessary to do so were fully developed in the testimony presented to the court by the plaintiff below. Therefore, plaintiff in error should have submitted to the trial court a proposition to be held as law embodying his theory of contributory negligence as applicable to the facts of the case, in accordance with section 41 of the practice act. Hurd, Rev. St. 1885, p. 904. He did not do so, and hence the question is not properly before us for our consideration.

The judgment of the appellate court is affirmed.

Judgment affirmed.

SHEIK v. HOBSON, Adm'r.

(19 N. W. 875, 64 Iowa, 146.)

Supreme Court of Iowa. June 11, 1884.

Appeal from circuit court, Clayton county.

Action for damages on account of slanderous words spoken of plaintiff by defendant's intestate. There was a verdict and judgment for plaintiff for $1,000. Plaintiff appeals.

J. W. Rogers & Son, for appellant. Murdork & Larkin, Ainsworth & Hobson, Noble & Updegraff, and Cyrus Wellington, for appellee.

REED, J. The action was originally brought against Henry Rush, but during its pendency he died, and defendant, Hobson, administrator of his estate, was substituted as defendant. The alleged slanderous words imputed to plaintiff a want of chastity. They are alleged to have been spoken in the presence of plaintiff's husband, and were to the effect that Rush had had sexual intercourse with plaintiff.

At the trial plaintiff asked the court to give the following instructions:

"(1) If you find that the defendant, Henry Rush, did publish in substance the words alleged in petition as the grounds of the action, and that said publication was made maliciously and wantonly, you are instructed that you may give exemplary damages. (2) You are instructed that if you find from the evidence that the slanderous words were published, and that the same were dictated or accompanied by malice, oppression, or gross negligence, you can give exemplary damages in your verdict." The court refused to give these instructions, but told the jury that "damages on account of maliciously speaking the words, or, in other words, exemplary damages, are not to be given." Error is assigned by plaintiff on the giving of this instruction, and the refusal to give those asked. The question raised by the assignment is whether exemplary or punitory damages may be awarded against the personal representative of a deceased wrong-doer. There is no doubt but, at common law, the remedy for injury such as plaintiff complains of determines upon the death of the wrong-doer. 1 Chit. Pl. 89. But under our statute (Code, § 2525) all causes of action survive, "and may be brought, notwithstanding the death of the person entitled or liable to the same." Plaintiff's position is that, under this section, the right is preserved to her to have damages of this character assessed on account of the wrongful and malicious act by which she has suffered, notwithstanding the death of the one who committed the act. But we think the position is not sound. It cannot be said, in any case,—unless the right is created by statute,—that the person who suffers from the wrongful or malicious acts of another, has the right to have vindictive damages assessed against the wrong-doer. Such damages are awarded as a punishment of the man who has wickedly or wantonly violated the rights of another, rather than for the compensation of the one who suffers from his wrongful act. It is true, they are awarded to the one who has been made to suffer, but not as a matter of right; for, while he is entitled, under the law, to such sum as will fully compensate him for the injury sustained, the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury. Plaintiff had a right of action, on account of the slanderous words spoken by Rush, for such sum as would compensate her for the injury. This was her cause of action, and this is what was preserved to her by the statute at his death. But she had no personal interest in the question of his punishment. So far as he was concerned, the punitory power of the law ceased when he died. To allow exemplary damages now, would be to punish his legal and personal representatives for his wrongful acts; but the civil law never inflicts vicarious punishment. Our holding as to the object of assessing exemplary damages in any case is abundantly sustained by the authorities, both in this state and elsewhere. We content ourselves, however, with citing the following cases in this state: Hendrickson v. Kingsbury, 21 Iowa, 379; Garland v. Wholeham, 26 Iowa, 185; Ward v. Ward, 41 Iowa, 686.

We think, therefore, that the holding of the circuit court is correct, and the judgment is affirmed.

LAKE SHORE & M. S. RY. CO. v. PRENTICE.

(13 Sup. Ct. 261, 147 U. S. 101.]

Supreme Court of the United States. Jan. 3, 1893.

No. 58.

In error to the circuit court of the United States for the northern district of Illinois.

Action by Chalmer M. C. Prentice against the Lake Shore & Michigan Southern Railway Company to recover damages for unlawful arrest of plaintiff, while a passenger, by the conductor of one of the company's trains. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by Mr. Justice GRAY:

This was an action of trespass on the case, brought October 19, 1886, in the circuit court of the United States for the northern district of Illinois, by Prentice, a citizen of Ohio, against the Lake Shore & Michigan Southern Railway Company, a corporation of Illinois, to recover damages for the wrongful acts of the defendant's servants.

The declaration alleged, and the evidence introduced at the trial tended to prove, the following facts: The plaintiff was a physician. The defendant was engaged in operating a railroad, and conducting the business of a common carrier of passengers and freight, through Ohio, Indiana, Illinois, and other states. On October 12, 1886, the plaintiff, his wife, and a number of other persons were passengers, holding excursion tickets, on a regular passenger train of the defendant's railroad, from Norwalk, in Ohio, to Chicago, in Illinois. During the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable. The conductor of the train, learning this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employe of the defendant, who boarded the train as it approached Chicago. The conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer, and ordered his arrest; and the officer, by direction of the conductor, and without any warrant or authority of law, seized the plaintiff, and rudely searched him for weapons, in the presence of the other passengers, hurried him into another car, and there sat down by him as a watch, and refused to tell him the cause of his arrest, or to let him speak to his wife. While the plaintiff was being removed into the other car, the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, openly declared that he was under arrest, and sneeringly said to the plaintiff's wife, "Where's your doctor now?" On arrival at Chicago, the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train, or to give her the check for their trunk; and, in the presence of the passengers and others, ordered him to be taken to the station house, and he was forcibly taken there, and detained until the conductor arrived; and, knowing that the plaintiff had been guilty of no offense, entered a false charge against him of disorderly conduct, upon which he gave bail and was released, and of which, on appearing before a justice of the peace for trial on the next day, and no one appearing to prosecute him, he was finally discharged.

The declaration alleged that all these acts were done by the defendant's agents in the line of their employment, and that the defendant was legally responsible therefor; and that the plaintiff had been thereby put to expense, and greatly injured in mind, body, and reputation.

At the trial, and before the introduction of any evidence, the defendant, by its counsel, admitted "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor;" but afterwards excepted to each of the following instructions given by the circuit judge to the jury:

"If you believe the statements which have been made by the plaintiff and the witnesses who testified in his behalf, (and they are not denied,) then he is entitled to a verdict which will fully compensate him for the injuries which he sustained, and in compensating him you are authorized to go beyond the amount that he has actually expended in employing counsel; you may go beyond the actual outlay in money which he has made. He was arrested publicly, without a warrant, and without cause; and if such conduct as has been detailed before you occurred, such as the remark that was addressed by the conductor to the wife in the plaintiff's presence, in compensating him you have a right to consider the humiliation of feeling to which he was thus publicly subjected. If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish."

"I am not able to give you any rule by which you can determine that; but, bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit."

"And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called 'smart money,' if you are satisfied that the conductor's conduct was illegal, (and it was illegal,) wanton, and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant."

"If a public corporation, like an individual.

acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power."

The jury returned a verdict for the plaintiff in the sum of $10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of $4,000, and asked that judgment be entered for $6,000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for $6,000. The defendant sued out this writ of error.

Geo. C. Greene, for plaintiff in error. W. A. Foster, for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment,—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. Rep. 469; Myrick v. Railroad Co., 107 U. S. 102, 109, 1 Sup. Ct. Rep. 425; Hough v. Railway Co., 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the secretary of state, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the chief justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes v. Wood, Lofft, 1, 18, 19, 19 Howell, St. T. 1153, 1167, See, also, Huckle v. Money, 2 Wils. 205, 207; Sayer, Dam. 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 13 How. 363, 371; Railroad Co. v. Quigley, 21 How. 202, 213, 214; Railway Co. v. Arms, 91 U. S. 489, 493, 495; Railway Co. v. Humes, 115 U. S. 512, 521, 6 Sup. Ct. Rep. 110; Barry v. Edmunds, 116 U. S. 550, 562, 563, 6 Sup. Ct. Rep. 501; Railway Co. v. Harris, 122 U. S. 597, 609, 610, 7 Sup. Ct. Rep. 1286; Railway Co. v. Beckwith, 129 U. S. 26, 36, 9 Sup. Ct. Rep. 207.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo, and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them; and, if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. v. Fiske, 2 Mason, 119, 121.[1] In Keene v. Lizardi, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are The State Rights, Crabbe, 42, 47, 48; The Golden Gate, McAll. 104; Wardrobe v. Stage Co., 7 Cal. 118; Boulard v. Calhoun, 13 La. Ann. 445; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Grund v. Van Vleck, 69 Ill. 478, 481; Becker v. Dupree, 75 Ill. 167; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. Rep. 93; Kirksey v. Jones, 7 Ala. 622, 629; Pollock v. Gantt, 69 Ala. 373, 379; Eviston v. Cramer, 57 Wis. 570, 15 N. W. Rep. 760; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. Rep. 488; McCarthy v. De Armit, 99 Pa. St. 63, 72; Clark v. Newsam, 1 Exch. 131, 140; Clissold v. Machell, 26 U. C. Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances. Railroad Co. v. Quigley, 21 How. 202, 210; Bank v. Graham, 100 U. S. 699, 702; Salt Lake City v. Hollister, 118 U. S. 256, 261, 6 Sup. Ct. Rep. 1055; Railway Co. v. Harris, 122 U. S. 597, 608, 7 Sup. Ct. Rep. 1286.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. Railroad Co. v. Derby, 14 How. 468; Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. Rep. 1039; Howe v. Newmarch, 12 Allen, 49; Ramsden v. Railroad Co., 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. Railroad Co. v. Quigley, 21 How. 202, 211; Salt Lake City v. Hollister, 118 U. S. 256, 262, 6 Sup. Ct. Rep. 1055; Reed v. Bank, 130 Mass. 443, 445, and cases cited; Krulevitz v. Railroad Co., 140 Mass. 573, 5 N. E. Rep. 500; McDermott v. Journal, 43 N. J. Law, 488, and 44 N. J. Law, 430; Bank v. Owston, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." Lothrop v. Adams, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In Detroit Daily Post Co. v. McArthur, in Eviston v. Cramer, and in Haines v. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines v. Schultz the supreme court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground,—wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive, cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine respondeat superior." 50 N. J. Law, 484, 485, 14 Atl. Rep. 488. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and, where it has been held that he can, it is admitted to be an anomaly in the criminal law. Com. v. Morgan, 107 Mass. 199, 203; Reg. v. Holbrook, 3 Q. B. Div. 60, 63, 64, 70, 4 Q. B. Div. 42, 51, 60.

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[1] Fed Cas. No. 1,681.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. Railroad Co. v. Quigley, Railway Co. v. Arms, and Railway Co. v. Harris, above cited; Caldwell v. Steamboat Co., 47 N. Y. 282; Bell v. Railway Co., 10 C. B. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696; Meagher v. Driscoll, 99 Mass. 281, 285; Smith v. Holcomb, Id. 552; Hawes v. Knowles, 114 Mass. 518; Campbell v. Car Co., 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor," the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that, "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called 'smart money,'" if they were "satisfied that the conductor's conduct was illegal, wanton, and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well-considered precedents.

In Railroad Co. v. Derby, which was an action by a passenger against a railroad corporation for a personal injury suffered through the negligence of its servants, the jury were instructed that "the damages, if any were recoverable, are to be confined to the direct and immediate consequences of the injury sustained;" and no exception was taken to this instruction. 14 How. 470, 471.

In Railroad Co. v. Quigley, which was an action against a railroad corporation for a libel published by its agents, the jury returned a verdict for the plaintiff under an instruction that "they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant." This court set aside the verdict, because the instruction given to the jury did not accurately define the measure of the defendant's liability; and, speaking by Mr. Justice Campbell, stated the rules applicable to the case in these words: "For acts done by the agents of the corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants." 21 How. 210, 213, 214.

In Railway Co. v. Arms, which was an action against a railroad corporation, by a passenger injured in a collision caused by the negligence of the servants of the corporation, the jury were instructed thus: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." This court, speaking by Mr. Justice Davis, and approving and applying the rule of exemplary damages, as stated in Quigley's Case, held that this was a misdirection, and that the failure of the employes to use the care that was required to avoid the accident, "whether called 'gross' or 'ordinary' negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." 91 U. S. 495.

In Railway Co. v. Harris, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's Case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610, 7 Sup. Ct. Rep. 1286.

The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards chief justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such willfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual, ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan v. Railroad Co., 3 R. I. 88, 91.

The like view was expressed by the court of appeals of New York, in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Cleghorn v. Railroad Co., 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the western and southern states. But of the three leading cases on that side of the question, Hopkins v. Railroad Co., 36 N. H. 9, can hardly be reconciled with the later decisions in Fay v. Parker, 53 N. H. 342, and Bixby v. Dunlap, 56 N. H. 456; and in Goddard v. Railway Co., 57 Maine, 202, 228, and Railway Co. v. Dunn, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedg. Dam. (8th Ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

Mr. Justice FIELD, Mr. Justice HARLAN, and Mr. Justice LAMAR took no part in this decision.

GODDARD v. GRAND TRUNK RY. OF CANADA.

(57 Me. 202.)

Supreme Judicial Court of Maine. 1869.

Action against the Grand Trunk Railway of Canada to recover damages for an assault made on a passenger by a brakeman in defendant's employment. There was a verdict for plaintiff, to which defendant excepted.

G. F. Shepley, for plaintiff. P. Barnes, for defendant.

WALTON, J. Two questions are presented for our consideration: First, is the common carrier of passengers responsible for the willful misconduct of his servant? or, in other words, if a passenger who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole traveling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand.

I. Of the carrier's liability. It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant, he consents to the unlawful act."

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible.

And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveler can have that these servants will be selected with care, is to hold those by whom the selection is made responsible for their conduct.

This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent and done without his consent. Howe v. Newmarch, 12 Allen, 55 (paragraph nearest the bottom of the page). And Messrs. Angell and Ames, in their work on Corporations ([8th Ed.] p. 404, § 388), say: "A distinction exists as to the liability of a corporation for the willful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other; and that toward one who has entered into some peculiar contract with the corporation by which this duty is increased; thus it has been held that a railroad corporation is liable for the willful tort of its servants whereby a passenger on the train is injured."

In Brand v. Railroad Co., 8 Barb. 368, the court say, a passenger on board a stage-coach or railroad-car, and a person on foot in the street, do not stand in the same relation to the carrier. Toward the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger, who is injured by a servant of the carrier, may have a right of action against him when one not a passenger, for a similar injury, would not.

In Moore v. Railroad Co., 4 Gray, 465, the plaintiff was forcibly put out of a car for not giving up his ticket or paying his fare, when in fact he had already surrendered his ticket to some one employed on the train. The defendants insisted that they were not responsible for the misconduct of the conductor; and further, that an action for an assault would not lie against a corporation. But the court held otherwise, and the plaintiff recovered.

In Seymour v. Greenwood, 7 Hurl. & N. 354, the plaintiff was assaulted and taken out of the defendant's omnibus by one of his servants. The defendant insisted that he was not liable, because it did not appear that he authorized or sanctioned the act of the servant. But it was held in the exchequer chamber, affirming the judgment of the exchequer court, that the jury did right in returning a verdict for the plaintiff.

In Railroad Co. v. Finney, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. After stating that it was insisted, by the counsel for the railroad, that in no case could a cause of action arise against the principal for the willful misconduct of the agent, the court went on to say, that after a careful examination of the position, they were satisfied it was not correct; that where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such misconduct be willful or merely negligent.

In Railroad Co. v. Vandiver, 42 Pa. St. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defense that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case the company and its agents were all liable for the injury done to the deceased."

In Weed v. Railroad Co., 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured, was willful. The court held the willfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In Railroad Co. v. Derby, 14 How. 468, where the servant of a railroad company took an engine and run it over the road for his own gratification, not only without consent, but contrary to express orders, the supreme court of the United States held that the railroad company was responsible.

In Railway Co. v. Hinds, 53 Pa. St. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In Flint v. Transportation Co., 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for $10,000.

In Landreaux v. Bell, 5 La. O. S. 275, the court say, that carriers are responsible for the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In Chamberlain v. Chandler, 3 Mason, 242, Judge Story declared in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

In Nieto v. Clark, 1 Cliff. 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge Clifford declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. And we have his authority for saying that he has recently examined the question with care, in a case pending in the Rhode Island district, where the clerk of a steamboat unjustifiably assaulted and maltreated a passenger, and that he entertains no doubt of the carrier's liability to compensate the passenger for the injury thus received, whether the carrier previously authorized or subsequently ratified the assault or not. A report of the case will soon be published. See 3 Cliff.

And a recent and well-considered case in Maryland (published since this case has been pending before the law court, and very much like it in all respects), fully sustains this view of the law. Railroad Co. v. Blocher, 27 Md. 277.

The grounds of the carrier's liability may be briefly stated thus:

The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages.

II. We now come to the second branch of the case. What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice Pratt (afterwards Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages. Huckle v. Money, 2 Wils. 205.

In another case the same learned judge declared with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. 5 Camp. Lives Chan. (Am. Ed.) p. 214.

In 1814, the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his ad damnum, and the court refused to set it aside. Mr. Justice Heath remarked in this case that he remembered a case where the jury gave five hundred pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages. Merest v. Harvey, 5 Taunt. 442. See, also, to the same effect, Sears v. Lyon, 2 Starkie, 317 (decided in 1818).

In 1844, Lord Chief Baron Pollock said, that in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages. Doe v. Filliter, 13 Mees. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages; but the court held otherwise. No doubt, said Pollock, C. B., it was a case in which vindictive damages might be given. Thomas v. Harris, 3 Hurl. & N. 961.

In 1860, in an action for willful negligence, the defendant contended that the plaintiff's declaration was too defective to entitle him to exemplary damages; but the court held otherwise; and the judge who tried the case remarked that he was glad the court had come to the conclusion that it was competent for the jury to give exemplary damages, for he thought the defendant had acted with a high hand. Emblen v. Myers, 6 Hurl. & N. 54.

"Damages exemplary," is now a familiar title in the best English law reports. See 6 Hurl. & N. 969.

It was the firmness with which Lord Camden (then Chief Justice Pratt) maintained and enforced the right of the jury to punish with exemplary damages the agents of Lord Halifax (then secretary of state) for the illegal arrest of the publishers of the North Briton, that made him so immensely popular in England. Nearly or quite twenty of those cases appear to have been tried before him, in all of which enormous damages were given, and in not one of them was the verdict set aside. In one of the cases a verdict for a thousand pounds was returned for a mere nominal imprisonment at the house of the officer making the arrest, and the court refused to set it aside. Beardmore v. Carrington, 2 Wils. 244.

"After this," says Lord Campbell, in his Lives of the Chancellors, "he became the idol of the nation. Grim representations of him laid down the law from sign-posts, many busts and prints of him were sold not only in the streets of the metropolis, but in the provincial towns; a fine portrait of him, by Sir Joshua Reynolds, with the flattering inscription, 'in honor of the zealous asserter of English liberty by law,' was placed in the guildhall of the city of London; addresses of thanks to him poured in from all quarters; and one of the sights of London, which foreigners went to see, was the great Lord Chief Justice Pratt."

In this country, perhaps Lord Camden is better known as one of the able English statesmen who so eloquently defended the American colonies against the unjust claim of the mother country to tax them. Lord Campbell says some portions of his speeches upon that subject are still in the mouths of schoolboys. But in England his immense popularity originated in his firm and vigorous enforcement of the doctrine of exemplary damages. And we cannot discover that the legality of his rulings in this particular was ever seriously called in question. On the contrary, we find it admitted by his political opponents that he was a profound jurist and an able and upright judge. His stringent enforcement of the right of the jury to punish flagrant wrongs with exemplary damages, arrested not only great abuses then existing, but it has had a salutary influence ever since. It won for him the title of the "asserter of English liberty by law."

In this country the right of the jury to give exemplary damages has been much discussed. It seems to have been first opposed by Mr. Theron Metcalf (afterwards reporter and judge of the supreme court of Massachusetts), in an article published in 3 Am. Jur. 387, in 1830. The substance of this article was afterwards inserted in a note to Mr. Greenleaf's work on Evidence. Mr. Sedgwick, in his work on Damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in 9 Bost. Law Rep. 529. Mr. Sedgwick rejoined in the same periodical (volume 10, p. 49). Essays on different sides of the question were also published in 3 Am. Law Mag. N. S. 537, and 4 Am. Law Mag. N. S. 61. But notwithstanding this formidable opposition, the doctrine triumphed, and must be regarded as now too firmly established to be shaken by anything short of legislative enactments. In fact the decisions of the courts are nearly unanimous in its favor.

In a case in the supreme court of the United States, Mr. Justice Grier, in delivering the opinion of the court, says, it is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. "We are aware," the judge continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." Day v. Woodworth, 13 How. 363.

In a case in North Carolina, the court refer to the note in Professor Greenleaf's work on Evidence, and say that it is very clearly wrong with respect to the authorities; and in their judgment wrong on principle; that it is fortunate that while juries endeavor to give ample compensation for the injury actually received, they are also allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. And the same court hold that the wealth of the defendant is a proper circumstance to be weighed by the jury, because a thousand dollars may be a less punishment to one man than a hundred dollars to another. In one case the same court sustained a verdict which in terms assessed the actual damages at $100, and the exemplary damages at $1,000. The court held it was a good verdict for $1,100. Pendleton v. Davis, 1 Jones (N. C.) 98; McAulay v. Birkhead, 13 Ired. 28; Gilreath v. Allen, 10 Ired. 67.

In fact, Professor Greenleaf is himself an authority for the doctrine of exemplary damages. Speaking of the action for assault and battery, he says the jury are not confined to the mere corporal injury, but may consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon award such exemplary damages as the circumstances may in their judgment require. 2 Greenl. Ev. § 89.

But if the great weight of Professor Greenleaf's authority were to be regarded as opposed to the doctrine, we have, on the other hand, the great weight of Chancellor Kent's opinion in favor of it. He says, surely this is the true and salutary doctrine. And after reviewing the English cases, he continues by saying it cannot be necessary to multiply instances of its application; that it is too well settled in practice, and too valuable in principle to be called in question. Tillotson v. Cheetham, 3 Johns. 56, 64.

This brief review of the doctrine of exemplary damages is not so much for the purpose of establishing its existence, as to correct the erroneous impression which some members of the legal profession still seem to entertain, that it is a modern invention, not sanctioned by the rules of the common law. We think every candid-minded person must admit that it is no new doctrine; that its existence as a fundamental rule of the common law has been recognized in England for more than a century; that it has been there stringently enforced under circumstances which would not have allowed it to pass unchallenged, if any pretext could have been found for doubting its validity; and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and that the decisions of the courts are now nearly unanimous in its favor. It was sanctioned in this state, after a careful and full review of the authorities, in Pike v. Dilling, 48 Me. 539, and cannot now be regarded as an open question.

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

In a case in Mississippi, the plaintiff was carried four hundred yards beyond the station where he had told the conductor he wished to stop; and he requested the conductor to run the train back, but the conductor refused, and told the plaintiff to get off the train or he would carry him to the next station. The plaintiff got off and walked back, carrying his valise in his hand. The plaintiff testified that the conductor's manner toward him was insolent, and the defendants having refused to discharge him, the jury returned a verdict for four thousand five hundred dollars, and the court refused to set it aside. They said the right of the jury to protect the public by punitive damages, and thus prevent these great public blessings from being converted into the most dangerous nuisances, was conclusively settled; and they hoped the verdict would have a salutary influence upon their future management. Railroad Co. v. Hurst, 36 Miss. 660.

In New Hampshire, in an action against this identical road, where, through gross carelessness, there was a collision of the passenger train with a freight train, and the plaintiff was thereby injured, the judge at nisi prius instructed the jury that it was a proper case for exemplary damages; and the full court sustained the ruling, saying it was a subject in which all the traveling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all the principal lines of travel, and there ought to be no lax administration of the law in such cases; and that it would be difficult to suggest a case more loudly calling for an exemplary verdict. (If mere carelessness, however gross, calls loudly for an exemplary verdict, what shall be said of an injury that is willful and grossly insulting?) Hopkins v. Railroad Co., 36 N. H. 9.

Judge Redfield, in his very able and useful work on Railways, expresses the opinion that there is quite as much necessity for holding these companies liable to exemplary damages as their agents. He says it is difficult to perceive why a passenger, who suffers indignity and insult from the conductor of a train, should be compelled to show an actual ratification of the act, in order to subject the company to exemplary damages. 2 Redf. R. R. 231, note. But if such a ratification is necessary, he thinks the corporation, which is a mere legal entity, inappreciable to sense, should be regarded as always present in the person of its servant, and as directing and ratifying the servant's acts within the scope of his employment, and thus be made responsible for his willful misconduct. 1 Redf. R. R. 515 et seq.

And in a recent case in Maryland (published since this case has been pending before the law court), a case in all respects very similar to the one we are now considering, the presiding judge was requested to instruct the jury that the plaintiff was not entitled to recover vindictive or punitive damages from the defendants, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed; but the presiding justice refused so to instruct the jury, and the full court held that the request was properly rejected; that it was settled that where the injury for which compensation in damages is sought, is accompanied by force or malice, the injured party is entitled to recover exemplary damages. Railroad Co. v. Blocher, 27 Md. 277.

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character, and feelings of self-respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self-respect, and freedom from insult are held. To those who set a very low value on character, and think that pride and self-respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. It would not be strange if some such persons, measuring the sensibilities of others by their own low standard, should view this verdict with envy, and regret that somebody will not assault and insult them, if such is to be the standard of compensation. While others, who feel that character and self-respect are above all price, more valuable than life itself even, will regard the verdict as none too large. We repeat, therefore, that it is a case where men's judgments will be likely to differ. And suppose the court is of opinion that the damages in this case are greater, much greater even, than they would have awarded, does it therefore follow that the judgment of the court is to be substituted for that of the jury? By no means. It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveller upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane, and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging Jackson. Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such indifference to the treatment the plaintiff had received, such indifference to the treatment that other travelers might receive, such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the public interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury.

On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

We see nothing in the rulings or charge of the presiding judge, of which the defendants can justly complain. And there is nothing to satisfy us that the jury were prejudiced or unduly biased; or that they made any mistake either as to the facts or the law. Our conclusion, therefore, is, that the exceptions and motion must be overruled.

Motion and exceptions overruled.

APPLETON, C. J., and DICKERSON, BARROWS, and DANFORTH, JJ., concurred.

TAPLEY, J., did not concur upon the question of damages, and gave his opinion as follows:

In so much of the opinion of Mr. Justice WALTON as determines the question of the liability of the defendants to answer in damages for the acts of the brakeman Jackson I concur; but I do not concur in sustaining the rulings of the court at the trial of the cause fixing the rule of damage for the jury; and I regard it so clearly wrong in principle, inequitable and unjust in practice, and so entirely wanting in precedent, that my duty requires something more than a silent dissent.

So much of the opinion as discusses the right of a jury to give in civil actions punitive damages, I do not propose now to review or express any opinion of or concerning, but it is to the application of the rule made in this case by the justice presiding at the trial of the cause. The rulings upon this matter are happily so clearly expressed and positive in terms, that no reasonable doubt concerning the proposition involved in them can be entertained. If by possibility any doubt could have arisen concerning them, the opinion he has drawn in the case sets them at rest.

The case shows that "on the subject of damages the presiding justice instructed the jury as follows: If the plaintiff has proved his case so that he is entitled to recover some damages, the question arises how much. That is a question which you must determine, being guided by the rules of law as I shall state them to you. In the first place, the plaintiff is entitled to such damages as he has actually suffered, and in estimating the amount, you will not be limited to what he has lost in dollars and cents. In fact, there is no evidence that he has suffered pecuniarily to any extent. You are to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering, occasioned by the assault, and the feeling of degradation that necessarily resulted from it. There are few men probably that would not rather suffer a severe pecuniary loss than a personal and insulting assault. Hence if one man should spit in another's face in public, the jury would not be limited to ten cents damages on the ground that that sum would pay him for washing his face. A man's feelings, self-respect, and pride of character are as much under the protection of the law in such case as his property. And in estimating the damages for a personal assault attended with opprobrious and insulting language, the jury have a right to consider the character and standing of the person assaulted, and the injury to his feelings, as well as the injury to his person, and then to give him such damages as, in view of all the circumstances, will be a just compensation for the injury actually suffered. This amount must be left, in every case, to the sound judgment and discretion of the jury."

Pausing at this point of the instructions, we shall notice that they embrace all the elements of compensatory damages recognized by courts of the most liberal views in these matters; and embrace elements which many courts denominate exemplary; and they are stated in so clear and concise a manner, and accompanied by so forcible an illustration, that had they stopped at this point the plaintiff might well have expected his verdict to cover the utmost his injuries would warrant. With the rule thus far I am content, although carrying it to the very verge and utmost limit of precedent. I call attention to it at this point to show that the jury had, at this time, instructions which covered all the tangible and intangible elements of assessment in such cases. Instructions which if adhered to and followed by the jury restore him to the condition in which the assaulting party found him, so far as money can do it. Under these instructions he is to be made whole in the eyes of the law, just as if the injury had not been done; in every particular compensated so far as money can do it; what is done beyond is not to compensate, it is not to meet mere speculative or intangible injuries, is not to give him anything due him, for he has his full desert. These elements reach everything he, as an individual, can claim by reason of any infringement of his rights.

These instructions having been given, so full, clear, and liberal, the presiding judge proceeds to give the next element of damage, which has not for its basis any injury, invasion of right or privilege, discomfort, inconvenience, or indeed anything relating to the plaintiff, or anything in which he has any interest above that possessed by every other member of the community. It is not act or deed, word or menace,—these have all been adjusted; but it is mere motive, thought, interest, and secret desire. Being evil, morally wrong, somebody must be punished for their existence, and the judge says:

"There is also another important rule of law bearing upon the question of damages. If the injury was wanton, malicious, committed in reckless and willful disregard of the rights of the injured party, the law allows the jury to give what is called punitory or exemplary damages. It blends the interests of the injured party with those of the public, and permits the jury not only to give damages sufficient to compensate the plaintiff, but also to punish the defendants. I feel it my duty, however, to say, that you ought to be very cautious in the application of this rule. The law does not require you to give exemplary damages in any case, and where the damages which the plaintiff is entitled to recover in order to compensate him for the injury he has actually suffered is sufficient to punish the defendants, and serve as a warning and example to others, the jury ought not to give more. But if they think it is not enough, then the law allows them to add such further sum as will make it enough for that purpose. But they should be careful in fixing the amount not to allow more than is just and reasonable, and not to allow their judgment to be swerved by their passions. Defendants' counsel requested the presiding judge to instruct the jury, that the plaintiff is not entitled to recover against the defendant company, any greater damages than he might against Jackson himself, for the same cause of action upon similar evidence. Upon which request the presiding judge stated to the jury: I decline to give you such instruction. I have endeavored to give you the correct rules by which the damages, if any, are to be assessed in this case; and I think you cannot rightfully be required to enter into a consideration of the damages which a party not now before the court, and has not therefore had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard, by those which you think ought to be just in another which has not been heard; we will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right.

"Defendants' counsel further requested the presiding judge to instruct the jury, that if the jury find that the acts and words of Jackson were not directly nor impliedly authorized, nor ratified by the defendants, then the plaintiff is not in any event entitled to recover vindictive damages against the defendants, nor damages in the nature of smart-money, which request was not complied with, the presiding judge having already instructed the jury upon what state of facts the plaintiff would be entitled to such damages."

I have copied all the instructions "on the subject of damages." It will be seen that these latter instructions are substantially that the jury having given full compensatory damages, may give others in their discretion to punish these defendants for the wanton, willful, and malicious act of their brakeman in assaulting a passenger, although they neither directly nor impliedly authorized or ratified the act.

This proposition must be sustained, if at all, upon one of two grounds; either that it is competent to punish one man for the criminal intent of another, or that the malice of the brakeman in this case was that of the defendant corporation.

A brief notice of some of the authorities touching the liability of the master for the acts of his servant will, I think, show the ground of liability, the reason for the rule, and exhibit a marked distinction between the ordinary case of master and servant and the case at bar.

In 2 Dane, Abr. c. 59, art. 2, it is said: "The master is not liable for the willful, voluntary, or furious act of his servant." "If my servant distrain a horse lawfully by my order, and then use him, this conversion is his act, and trover lies against him; for my order extends only to distraining the horse, and not to using him; this is his own act."

"Nor is the master bound for the voluntary acts of his servants; for if he be bound, servants may ruin their masters by willful acts; nor are willful acts, wrongs authorized by their masters."

"If I order my servant to do what is lawful, and he does more, he only is liable; it is his own act, otherwise he might ruin me, and in such case there can be no express or implied command from me for what he does beyond his orders; and whenever the question is how far the master is liable for his servant's acts, the material inquiry must be, how far he expressly or impliedly authorized it."

"The master is liable for the negligent act of his servant, but not for his willful wrong; is liable in trover; for which rule several reasons may be given: (1) A willful wrong is the servant's own act. (2) To allow him by his willful tortious act to bind his master and subject him to damages, would be to allow servants a power to ruin their masters. (3) In such cases there is no command from the master expressed or implied to do a willful wrong."

In 4 Bac. Abr. tit. "Master and Servant," it is said: "The master must also answer for torts, and injuries done by his servant in the execution of his authority. But though a master is answerable for damages occasioned by the negligence or unskillfulness of his servant acting in the execution of his orders, yet he is not answerable in trespass for the willful act of his servant done in his absence, and without his direction or assent."

Chancellor Kent says: "The master is only answerable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which when he commits, he steps out of the course of his service. But it was considered in McManus v. Cricket, 1 East, 106, to be a question of great concern and of much doubt and uncertainty, whether the master was answerable in damages for an injury willfully committed by his servant while in the performance of his master's business, without the direction or assent of the master. The court of K. B. went into an examination of all the authorities, and after much discussion and great consideration, with a view to put the question at rest, it was decided that the master was not liable in trespass for the willful act of his servant in driving his master's carriage against another, without his master's direction or assent. The court considered that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed so far a willful abandonment of his master's business. This case has received the sanction of the supreme court of Massachusetts and New York, on the ground that there was no authority from the master express or implied, and the servant in that act was not in the employment of his master."

In Wright v. Wilcox, 19 Wend. 343, Cowen, J., who gave the opinion of the court, says: "If the act was willful, the master is no more liable than if his servant had committed any other assault and battery. All the cases agree that a man is not liable for the willful mischief of his servant, though he be at the time in other respects engaged in the service of the former." After citing several cases he adds: "Why is a master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is not within the scope of his agency." He says: "The authorities deny that when the servant willfully drives over the man, he is in his master's business. They held it a departure, and going into the servant's own independent business."

In Turnpike Co. v. Vanderbilt, 1 Hill, 480, case of a collision of steamboats, the supreme court held that if the collision was willful on the part of the defendant's servant, the defendant was not liable, referring to Wright v. Wilcox. The case afterward went to the court of appeals (2 Com. 479) where the doctrine applied in the supreme court was sanctioned; and it was further held that the corporation was not liable, although the willful act producing the injury was authorized and sanctioned by the president and general agent thereof; because a general or special agent, when he commits or orders a willful trespass to be committed, acts without the scope of his authority.

In Hibbard v. Railroad Co., 15 N. Y. 455, which was "an action against the corporation for ejecting a passenger from the cars, who, having once exhibited his ticket, refused so to do when again requested by the conductor," Brown, J., in giving his opinion says, speaking of a requested instruction concerning damages, "the object of the request was, that the court should discriminate between those acts of the company's agent done in the execution of its directions, and those done in the excess of its instructions and without authority or approbation. This I think should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and, whatever tortious acts they commit by its direction, it is responsible for and no other. This is upon the principle that what one does by another he does by himself. For injuries resulting from the carelessness of the servant in the performance of his master's business the latter is liable. But for the willful acts of the servant the master is not responsible, because such willful acts are a departure from the master's business;" and cites the case of Wright v. Wilcox, and cases there cited.

In the same case Comstock, J., says: "If the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see upon what principle the defendants can be made liable for the wrong. The regulation and instructions to the conductor, as we have said, were lawful, and they did not in their terms or construction profess to justify the trespass and eviction. The result is, the wrong was done without any authority, and, therefore, that those who actually did it are alone unanswerable." "If he mistook the authority conferred upon him both when he committed the trespass and when he was examined as a witness, it cannot alter the law or change the rights of the parties. His own mistake as to the extent of his powers cannot make the railroad company liable for acts not in fact authorized." These cases are all cited in a subsequent case. Weed v. Railroad Co., 17 N. Y. 362.

The rule is thus stated in Story, Ag. § 456: "But although the principal is liable for the torts and negligence of his agents, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in matters beyond the scope of the agency unless he has subsequently adopted them for his use or benefit. Hence it is that the principal is never liable for the unauthorized, the willful, or the malicious act or trespass of his agent."

Mr. Hilliard, in his work on Torts, says: "In general, a master is liable for the fault or negligence of his servant; but not for his willful wrong or trespass. The injury must arise in the course of the execution of some service lawful in itself, but negligently or unskillfully performed, and not be a wanton violation of law by the servant, although occupied about the business of his employer." Hil. Torts, c. 40.

In Parsons v. Winchell, 5 Cush. 592, Metcalf, J., says: "But the act of a servant is not the act of a master even in legal intendment or effect unless the master personally directs or subsequently adopts it. In other cases, he is liable for the acts of his servant when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, 'to make compensation for the damage consequential for his employing of an unskillful or negligent servant.'" 1 East, 108.

Of this latter class of cases, Story says: "In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all the matters of the agency." Story, Ag. § 452.

In Southwick v. Estes, 7 Cush. 385, Dewey, J., instructed the jury "that if the act of the servant were not done negligently but willfully with the intention of disregarding the directions of the master, he would not be responsible therefor." This instruction was held correct, and the case of McManus v. Crickett was cited by the court.

In Railroad Co. v. Langley, 21 How. 202, Mr. Justice Campbell in delivering the opinion of the court says, "the result of the cases is that for acts done by the agents of a corporation either in contractu or in delicto in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

In Weed v. Railroad Co., 17 N. Y. 362, this rule was invoked to relieve the defendants from the consequences of the willful act of the conductor in the detention of a train whereby a passenger was made sick and suffered permanent injury in her health. Strong, J., in delivering the opinion of the court says: "The defendants insist that they are not liable for the willful act of the conductor followed by such a result; and they invoke, in support of their position, the rule, well sustained by principle and authority, that a master is not liable for a willful trespass of his servant." He then proceeds to say: "It is important, therefore, to inquire whether that rule extends to a case like the present, and for that purpose to consider the basis on which it is founded. The reason of the rule clearly appears by the cases in which it has been declared and applied." He then examines many of the cases where the rule has been stated and applied, and cites also Story, Ag. § 456, and then says: "All the cases on the subject, so far as I have observed, agree in regard to the principle of the rule, and also in limiting the rule to that principle. For acts of an agent within his authority, the principal is liable, but not for willful acts without his authority." Railroad Co. v. Derby, 14 How. 468. He then proceeds, in reference to the case then under consideration, to say: "In the light of this examination of the class of cases which has been considered, it cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of willful, unauthorized, wrongful acts by agents, unapproved by their principals, occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only with which the principals are not legally connected. In the present case, by means of the wrongful, willful detention by the conductor, the obligation assumed by the defendants, to carry the wife with proper speed to her destination, was broken. The real wrong to the wife in this case, and from which the damage proceeded, was the not carrying her in a reasonable time to Aspinwall as the defendants had undertaken to do, and this was a wrong of the defendants unless the law excused them for their delay on account of the misconduct of their agent." In the conclusion of his discussion he says, the rule of law, relied on by the defendants to sustain their position, is inapplicable to the case, and that it makes no difference whether the act was willful or negligent as to the liability of the defendants for a nonfulfillment of their contract. From an examination of these authorities, I think it will be found that the principal is liable for the act of his agent in three classes of cases:

I. Where the act is done by the previous command of the principal, or is subsequently ratified or adopted by him.

This command may appear from proof of specific directions, or implied from the circumstances of the case.

II. Where the agent negligently, unskillfully or otherwise improperly performs the duties pertaining to his employment.

III. Where the act of the agent has caused the breach of a contract, or prevented the performance of an obligation due from, and existing between, the principal and a third person.

The liability, in the first class of cases, rests solely upon the maxim, "Qui facit per alium facit per se;" and in no other cases is he liable as an actor, but in those cases where he has commanded the act or subsequently ratified it, which is regarded in law as a previous command.

The authorities, ancient and modern, are believed to be uniform upon this proposition, and wherever a liability attaches for an unauthorized act, it is founded upon some other reason.

In the second class the agent is held out as competent and fit to be trusted (by the principal), and he, in effect, warrants his fidelity and good conduct in all the matters of the agency; by reason of this, as Lord Kenyon says, he becomes liable "to make compensation for the damage consequential for his employing of an unskillful or negligent servant." As to whether this warranty covers the willful tortious acts of the agent while engaged in and about the master's business, the authorities do not all agree. Some hold that as soon as the act becomes a willful trespass, the master is no longer liable; others hold that for acts done in the course of his employment the master is responsible whatever may be the animus of the actor. A review of the authorities, touching this question, will be found in the case of Railroad Co. v. Baum, 26 Ind.

The liability, in the third class of cases, rests not upon the lawfulness or unlawfulness of the act done by the agent, but as grounded upon the failure of the principal to perform a contract or fulfill an obligation with the party injured. In this class of cases it matters not whether the act be a "willful trespass" or not; whether it was done in the course of the employment of the servant is immaterial; if the act produces the breach of the contract, or causes a failure to fulfill the existing obligation, the liability to answer attaches. The gravamen of the charge is not that the agent has done this or that act, but that the principal has not fulfilled his agreement.

That the case at bar comes within this class of cases I think there can be no doubt, and the liability of the defendants is well placed upon those grounds, by Mr. Justice WALTON, and could be sustained upon no other.

In the light of these authorities and decisions, ancient and modern, emanating from courts of the highest jurisdiction, character, and ability, what is the true rule of damages in the case at bar? Or, putting the question in a more pertinent form, were the defendants liable to punitory damages, such as "is sufficient to punish the defendants and serve as a warning and example to others."

If the act of Jackson was a willful, wanton, and malicious trespass upon his part, and was neither directly nor impliedly authorized or ratified by the defendants, the act was neither in fact nor legal intendment the act of the defendants. This is quite clear from reason and authority. Although it may be one which devolved upon them a liability, it is in no sense their act; so that, if ordinarily the malice of the acting agent was so inseparably connected with the act that it would attach to the principal, nolens volens, in those cases where, by legal intendment, it was his, the principal's act, in this case it would not, it being neither in act or legal intendment the act of the defendants.

The requested instruction clearly presented the proposition that unless the act was authorized directly or impliedly, or subsequently ratified by the defendants, they could not be chargeable with the motive and intent of the actor. This was refused and the rule left, that, regardless of authorization or ratification, they might be punished for the willful, wanton, and malicious acts of Jackson.

The ruling, it is apparent, extends to cases not within the first class, and the result of placing it in either of the other classes is to punish one for the malice of another. To relieve the case from this difficulty an effort is made to make corporations an exception to the rule, although all the authorities, whether found in elementary treatises or judicial decisions, place them upon the same footing. The idea put forward seems to be, that the servant is the corporation. In order, however, that the position may certainly stand as it is made, and the argument proceed upon no erroneous deductions of mine, I quote: "A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and those minds and hands are its minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation is 'sheer nonsense,' and only tends to confuse the mind and confound the judgment."

In relation to this proposition one inquiry may be made, viz.: Have these servants no "minds," no "hands," and no "schemes" except those of the corporation? Are all their schemes, all their acts, and all the emanations of their minds those of the corporation? If they have any other, shall the corporation be punished for them?

Does not the argument attach a responsibility to the corporation for all the acts of a person in its employ? If it does not, where is the dividing line? It is all, or part. What part? This is the question which law-writers and judges have been answering for many years, and whether, in the estimation of any, it be or not "sheer nonsense," they have distinguished between those acts of the agent for which the corporation is, and those for which it is not liable.

What its "voice" commands, what its "hands" do, and the "schemes" which it executes, it should be and is held responsible for, whether done by direct or implied authority or subsequently ratified by them; and when they do this in wanton and willful disregard of the rights of others, they may, under the law as now administered, be punished by punitive damages.

But when the "voice" which speaks, and the "hand" which executes, is not that of the principal, however wanton, willful, and malicious it may be, the "stones," even, "cry out" against inflicting upon him a punishment therefor, and the more wanton and malicious the act, the more horrible is the doctrine.

Corporations are but aggregated individuals acting through the agency of man. They may consist of a single individual, or more, and they are no more ideal beings when thus acting than the individual thus acting. For certain acts the individual, though not manually engaged in it, is held responsible. For the same acts the body of individuals, denominated a corporation, are held responsible. The principal and agent, in both cases, are separate and independent beings. Agents presuppose a principal,—somebody to act for. Somebody whose orders they are to execute, and somebody for whom they are to perform service; somebody who is answerable to them, and who may be answerable for the acts done under their direction. Mr. Justice Brown, in Hibbard v. Railroad Co., before cited, says, "The conductor and those who aided him are not the company; they are its agents and servants." If the employee and servant is the corporation, in fact or legal intendment, it does not act through agents. Its acts are all the direct acts of principals without the intervention of any other power, and it carries us back to a responsibility for all the acts of a person employed by a corporation, whether those acts have any relation to his particular employment or not, a proposition too absurd and monstrous in its results to be entertained at all. Mr. Justice Campbell, in giving the opinion of the supreme court of the United States, in the case before cited (21 How. 202), says, the result of the cases is that for acts done in the course of its business and of their employment "the corporation is responsible, as an individual is responsible, under similar circumstances."

I, therefore, come to the conclusion that if liable at all to be punished for the malice of Jackson, it must be upon some other ground than their legal identity with him, and that in no sense can his malice be said to be their malice; and there seems to be strong indications in the charge of the presiding judge, that he, at that time, placed it upon no such grounds. The defendants, in view of this assumption by the plaintiff, "requested the presiding judge to instruct the jury that the plaintiff is not entitled to recover against the defendant company any greater damages than he might recover against Jackson himself, for the same cause of action upon similar evidence." This instruction the court declined to give, and remarked to the jury, "I think you cannot rightfully be required to enter into a consideration of the damages which a party, not now before the court, and has not, therefore, had an opportunity to be heard, ought to pay, and then measure the damages in this case which has been heard by those which you think might be just in another case which has not been heard. We will endeavor to decide this case right now, and when Jackson's case comes before us, if it ever does, we will endeavor to decide that right."

I think the argument is very strong from this remark, that it was not the malice and ill-will of Jackson that was designed to be punished, for he says his case has not been heard. The court say, substantially, we know not what excuses or justification he may offer when heard, if ever, "and when his case comes before us, if ever it does, we will endeavor to decide that right." One would suppose that it was some "wanton, malicious act, committed in reckless and willful disregard of the rights of the injured party," by these defendants that was to receive such punishment as should "serve a warning and example to others," and not such an act done by Jackson. The argument would seem to proceed and say Jackson, for his act, may deserve one punishment, and those defendants, for their acts, may deserve another; and I cannot well forbear the inquiry here, if there is not here some evidence of an "attempt to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant, and the malice of the corporation; or the punishment of the servant, and the punishment of the corporation?" Was it here that "sheer nonsense" was enacted, and "the mind confused," and the "judgment confounded"?

If it was the malicious act of the defendants that was to be punished, the enormity of Jackson's wrong had indeed nothing to do with it. If it was the malicious wrong of Jackson that was to be punished, why should a party, innocent of all wrong in the matter, be punished more than the wrong-doer himself. If he was the corporation, why would not all the acts of extenuation and justification surrounding him be also the acts of the corporation, and be proper elements to be considered in graduating or fixing the penalty? How could his case come before us, if he was the corporation? Would it be to be punished for the act of the corporation?

If we hold both guilty and both liable, it must be founded upon the idea of two actors, and that the employee is not only the corporation but somebody else, and the nonentity of agent becomes itself a nonentity, and instead of a mere imaginary thing which swallows up and extinguishes all the relations of principal and agent, and renders any attempt to distinguish between them "sheer nonsense," we do have two distinct, independent, accountable subjects, susceptible of being brought before the courts to answer and be punished, and we are not left to the ideal action of punishing an ideal existence. Again; if the actor is brought before the court and punished, would he be punished for the act of the corporation or his own act? for the malice of the corporation, or his own malice? If imprisoned, should we say the corporation was imprisoned?

If not, and he is (as undoubtedly he may be) called to answer for an assault, and punished for an assault, when we come to fix the punishment, do we not distinguish between his guilt and the guilt of the corporation, his malice and the malice of the corporation? And when the rule is required that we punish him in the same manner and to the same extent as the corporation, should we not reply very much as did the presiding judge at the trial? I think there can be no two opinions about the matter, and that there is manifestly a distinction between the two, and that there are two to distinguish between, and that when the act is authorized by any previous command or subsequent adoption, it is not, and cannot in the nature of things be made the act of another than the actor. Laws may be made making others responsible therefor, but it is the act of him who does it, and not of him who neither does nor authorizes it; and no amount of judicial legislation or refinement can make it so; as before remarked, it is not possible in the nature of things.

Again, if this servant is the corporation, what becomes of the law regulating the liability of the principal for an injury received by an employee while in the business of the corporation. It is held, that if the injury was produced by the carelessness or negligence of the master or corporation, they must respond in damages; but if produced by the act of a fellow-servant, they are not liable. Is not here a distinction recognized between the guilt of the servant and the guilt of the corporation? Is not here a manifest distinction noted and acted upon between the servant and corporation? If the servant is the corporation, it is the act of the corporation when done by the fellow-servant. But these cases say, no. You assume the risks arising from the acts of your fellow-servants, but not the acts of your principal, the corporation; when the corporation is negligent you may recover, but when it is the servant, you cannot. Again, I ask, how can this be, if the servant is the corporation? This new idea, it appears to me, has in it more of ingenuity than logic or substance; it is altogether ideal, and if it finds place in the law, it will be among its fictions.

The learned judge then adds, "And it might as well not be applied to them at all, as to limit its application to cases where the servant is directly and specially directed by the corporation to maltreat and insult a passenger, or to cases where such an act is directly and specifically ratified; for no such cases will ever occur." The instruction requested and refused, used the term directly or "impliedly," and with this sentence so amended, I have simply to say, that if no such case ever does occur, there is no occasion, right, or propriety in inflicting the punishment. If the act is neither directly nor impliedly authorized or ratified, there is in it no wantonness, no malice, and no ill-will toward the person injured, and no public wrong by them done to be redressed or atoned for. Repentance with them is absolutely impossible. The argument is simply this: if we do not punish you when you do not directly or impliedly authorize or adopt a wrong, we shall never have an opportunity, for you never will thus authorize or adopt one. The argument is clearly stated by the learned judge, and I leave it as he left it, remarking, that if the end to be attained is the punishment of railroad corporations whether guilty or innocent, the rule requiring them first to be guilty of wrong had better be abolished.

That the learned judge meant to state his argument thus, is, I think, apparent from the remark which immediately follows: "that if those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured."

In Railroad Co. v. Baum, 26 Ind. 70, the court say: "Nor will sound policy maintain the application of a rule to railways or corporations on this subject, which shall not be alike applied to others, as has been intimated in some quarters. The suggestion is not fit to be made, much less sanctioned, in any tribunal pretending to administer justice impartially."

In another case it is said: "The law lays down the same rule for all, and we cannot make a different rule in the case of a servant of a railway company and an ordinary tradesman;" "and, therefore, treating Phillips as the servant, the company are not liable for his tortious act any more than other individuals would be." Roe v. Railroad Co., 7 Eng. Law & Eq. 547.

With the criticism (if it be entitled to that appellation) of the opinion upon railroads and their management I have, in the position I now occupy, no occasion to deal. My duty I consider performed, and best performed, when I have endeavored to ascertain the law as it is, and apply it to causes as they are presented, rather than in making rules for any real or supposed grievances. The law-making power is ample to afford the necessary means of redress where none now exists; and did these great and growing evils really exist, we might reasonably expect to find the law-makers, the people, those who must suffer by their existence, exercising their corrective powers.

If the evil is not sufficient to induce the sufferers to provide a remedy, it will hardly justify the judiciary in leaving the clear path of the duty of expounding the law, and assuming the powers and responsibilities of law-makers. Perhaps there has been no one thing that has introduced into the law so much confusion and embarrassment as the engrafting policy of courts; adding here a little and there a little, till the original is covered with these judicial excrescences; and not unfrequently the jewel is lost in its surroundings of dross.

The plaintiff, in the printed brief of his argument presented in this case, says: "If, therefore, an individual master, perhaps personally innocent of positive evil intent is liable to punishment by exemplary damages for the malice of his servant, for a much stronger reason ought a soulless corporation to be responsible for the wicked and wanton acts of its sole representative."

In my judgment, if the premise were right in this proposition, there is no reason why the conclusion is not right. But I know of no case where the master, innocent of all wrong upon his own part, has been held to be liable to punishment for the malice of his servant. It is only where he has been a participator in some manner in the wantonness and malice displayed in the act, and it is his own wanton and malicious act that is then punished. The plaintiff says further: "Besides, if corporations cannot be reached in exemplary damages for the malice of their servants, they escape entirely, and thus stand infinitely better than citizens who are liable in punitory damages, not only for their own personal acts, which latter it is obvious a corporation can never be guilty of in the strict sense." If citizens were liable in punitory damages for the malice of their servants, in nowise participated in by themselves, the conclusion that corporations would stand better than citizens, if they escaped a punishment for the malice of their servants, is irresistible; but again I say, I know of no law, authority, or reason for holding an innocent citizen to punishment for the malice of his servant or agent. It is quite as much as one can reconcile with just accountability to hold him to compensate for injuries maliciously inflicted in the course of his employment, without adding punishment.

The theory of punitive damages is the infliction of a punishment for an offense committed. It presupposes the existence of a moral wrong, an infraction of the moral code; a wrong in which the community has some interest in the redress, and in securing immunity from in the future. It presupposes also an offender, and designs to punish that offender. To punish one not an offender is against the whole theory, policy, and practice of the law and its administrators. "It is better that ten guilty men should escape than one innocent man should suffer." Before the smallest fine can be inflicted, evidence, leaving no reasonable doubt of the guilt of the party to be thus punished, must be adduced. Evidence that he possessed the evil intent, wicked and depraved spirit; that it was he that was regardless of social duty. The idea of punishing one who is not particeps criminis in the wrong done is so entirely devoid of the first principles and fundamental elements of law, that it can never find place among the rules of action in an intelligent and virtuous community. There is no parallel, for it is in the administration of the law, and courts of the highest repute have, whenever the question has arisen, declared it unsound in principle and inequitable in practice.

In Hagan v. Railroad Co., 3 R. I. 188, Broughton, J., in delivering the opinion of the court says: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and security to the individual ought to be punished. If, in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as a punishment, and teach the lesson of caution to prevent repetition of such criminality, yet we do not see how such damages can be allowed, when a principal is prosecuted for the tortious act of a servant, unless there is proof in the case to implicate the principal, and make him particeps criminis of his agent's act. No man shall be punished for that of which he is not guilty. Cases may arise in which the principal is deeply implicated in the servant's guilt or fault,—cases in which the conduct of the principal is such as to amount to a ratification. In all such cases, the principal is particeps criminis, if not the principal offender; and whatever damages might properly be visited upon him who commits the act, might be very properly inflicted upon him who thus criminally participates in it. But where the proof does not implicate the principal, and however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrong of a person acting as his servant."

In Railroad v. Finney, 10 Wis. 388, which was a case for putting a passenger off the cars before reaching the end of the route to which his ticket entitled him, the court below instructed the jury that "in this case, if you find the complaint sustained by evidence, you may give such damages as shall compensate the plaintiff for his loss by the act of the defendant, and also such exemplary damages as you may find proper under the circumstances." The defendants requested an instruction "that they should give the plaintiff such damages only as would compensate him for his loss by reason of putting off the cars; that they could not give vindictive or punitory damages, called smart-money." This instruction was refused. The court, in giving their opinion, say: "The judge improperly refused to instruct the jury as requested by defendants' counsel, that the plaintiff was only entitled to recover such sum as would compensate him for his actual loss by being put off the cars, and that he was not entitled to vindictive damages or smart-money. If it be admitted that the action of the conductor in expelling the plaintiff from the cars was willful and malicious, or so grossly negligent, oppresive, or insulting as to bring the case within the rule authorizing exemplary damages, if the suit had been brought against him; yet there was not one word of testimony offered showing, or tending to show, that such conduct on his part was either previously directed, or subsequently ratified or adopted by the company; although they may be liable in this action to indemnify the plaintiff for the actual loss or damage which he sustained by reason of the misconduct of the conductor, because it occasioned a breach of their duty or obligation to carry him from Madison to Edgerton. Still it does not follow that they may be visited with damages by way of punishment, without proof that they directed the act, or subsequently confirmed it. Defendants are not to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But how can such damages be assessed against a principal with such intent? Surely they cannot be. But in an action against the principal for the act of the agent, how can the question of their assessment be properly submitted to the jury when there is no evidence connecting the principal with such intent on the part of the agent? Clearly it cannot." The damages in this case were $175, and the judgment of the court below was reversed.

Turner v. Railroad Co., 34 Cal. 594, was an action for unlawfully ejecting the plaintiff from a car by the conductor. The court below ruled "that the injury, if committed, and if a willful one on the part of the defendants in their servant the conductor, and accompanied by malice or such acts as in their nature tended to show a purpose of resentment or ill-will, or a disposition to degrade the plaintiff, entitled her to what is called exemplary damages." After some comment, and citing Story, Ag. § 456, 19 Wend. 343, and 14 How. 486, before referred to, the court say: "Tested by these principles, it is obvious that in this case the defendant was not liable for any malicious and wanton conduct of the conductor. If liable at all, its liability must be confined to the actual damages which the plaintiff suffered. To render the defendant liable to punitive damages, it was incumbent on the plaintiff to show that the act complained of was done with the authority either express or implied of the defendant, or was subsequently adopted by the company." "If her expulsion resulted from the malice of the conductor, or was accompanied by violence or personal indignity, the conductor alone is responsible for such damages as she may be entitled to for this cause beyond the actual damages resulting from her exclusion from the car, unless as before stated the company expressly or tacitly participated in the malice and violent conduct of the conductor. In other words, if the act of the conductor was wholly unauthorized, the company is liable for the actual damage, and the conductor alone for the punitive damages, if any."

There is another case in the same volume (34 Cal. 586,—Pleasants v. Railroad Co.), and decided upon the same grounds.

In Clark v. Newson, 1 Exch. 131, and 1 Welsb. H. & G. (a case of joint trespass by two), Pollock, C. B., said: "I think it would be very wrong to make the malignant motive of one party a ground of aggravation of damages against the other party who were altogether free from any improper motive. In such case the plaintiff ought to select the party against whom he means to get aggravated damages."

In relation to the views thus expressed, it is said by Mr. Justice WALTON, in his opinion, that: "In none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty. And what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish." Waiving, for the present, the question of fact as to whether they were or not simply cases of mistaken duty, we find in each of them the question of punitive damages legitimately and clearly raised and discussed, and the reasoning, such as it is, is before the profession. The cases are not cited as mere authority by reason of their being decided cases by courts of competent jurisdiction, but because the reasoning is believed to support the decision. If the reasoning is bad, fallacious, inconclusive, some would adopt the plan of exhibiting these facts by a course of reasoning of their own, rather than by promulgating a general proposition that it is unsafe to rely upon their reasoning. If the reasoning is sound and applicable to case at bar, it does not matter that it was, or was not necessarily called out in the case into which it has been introduced, and it requires some other answer than mere criticism upon course of proceeding by the judges in those cases.

That the gentlemen, composing the several courts alluded to, supposed the cases called for the decisions and reasonings they made, cannot well be doubted, and an examination of the cases as reported in the printed volumes of the reports referred to, will, I think, leave the reader in no doubt concerning that question.

There are some other cases to be found in the books not referred to on the defendant's brief to which I will advert as indicating the views of some of the courts in other states.

Ackerson v. Railway Co., 32 N. J. Law, 254, was an action to recover damages for injuries sustained while traveling in their cars by reason of the carelessness and disobedience of the employees of the road. The court say: "It appeared on trial that the defendants had adopted all needful rules and regulations for the running of their trains, and had employed competent persons as tenders of the switch at which the accident occurred. No care or caution, required for the safety of the passengers, had been omitted by the company. Through the carelessness and disobedience of their agents the accident happened." "In fact, the only fault or negligence complained of was that of the employees of the company. Where a railroad company adopts all rules and regulations needful for the safety of passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, I do not think that the company, in case of injury to the passengers happening by reason of the failure of the agent to perform his duty, can be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart-money. This rule does not prevail where the carelessness is only that of a subordinate agent. There is no justice in punishing the company after it has done all in its power to prevent an injury. The agent, if guilty of negligence, may, in certain cases, be proceeded against by indictment. I cannot yield to the argument so earnestly urged by the counsel of the plaintiff, that by construction of law the company is guilty of gross negligence whenever its agent is, and is, therefore, to be treated the same as if through its own negligence the injury happened. I think the verdict was against the charge of the court in that it is, to some extent at least, for punitive damages. Full compensation to the plaintiff for all real loss, present and prospective, was the measure of damages."

Porter v. Railway Co., 32 N. J. Law, 261, argued at the same time, was determined upon the rules announced in this case.

These cases well indicate the views of the court in New Jersey. McKeon v. Railway Co., 42 Mo. 79, was an action for an injury done to a passenger. The court, in giving their opinion, say: "If the conduct of this driver was willful and malicious with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of willful and malicious trespass. The company was answerable only for his negligence, or his incapacity, or unskillfulness in the performance of the duties assigned to him. In such cases we have no hesitation in saying, that punitory damages, or any damages beyond a full compensation for the injury sustained, cannot be allowed."

Railroad Co. v. Smith, 2 Duv. (Ky.) 556, was a case where the evidence tended to show that the car of the plaintiffs was upset by the carelessness of their driver, and defendant injured thereby. The instruction was, "That if the car was thrown from the track by the fast and careless driving of the defendants' (now plaintiffs') agent, they should find for plaintiff (now defendant), and that the jury are not necessarily restricted to actual damages, but may, in their discretion, award such exemplary damages as they deem just and proper in view of all the facts in the case." The court say, the facts did not authorize a punishment of the defendants, and the court below should have restricted them to compensatory damages, and for this reason the judgment was reversed.

In the case of Hill v. Railroad Co., 11 La. Ann. 292, the court used the following language: "In actions of this kind, it is not within the province of the jury, although negligence is clearly proven, to give vindictive damages, as is sometimes allowed in case of willful and malicious injuries. The company, in such cases, is not to be punished for the negligence of its agents as a crime."

Keene v. Lizardi, 8 La. 27, was an action brought to recover damages of defendants, ship-owners, for injuries to plaintiff's wife, at the hands of a master of a vessel on which she was a passenger. The evidence showed gross neglect and wanton outrage on the part of the master against the lady. In delivering the opinion of the court, the judge said: "It is true, juries sometimes give what is called smart-money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrong-doer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is liable for the acts of his factor or agent."

In Railroad Co. v. Rogers, 28 Ind. 1, it is said: "Whatever rule of damages would apply in a suit against a natural person, ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjust innovation. The instructions, governing subordinate employees and agents, may be devised in such utter disregard of the rights of others, that obedience to them will result in palpable wrong to individuals; whether it was so here was a question for the jury,"—thus putting the question whether the acts are done in obedience to instructions that the execution of would result in palpable wrong.

Post Co. v. McArthur, 16 Mich. 447, was an action by McArthur for publishing an alleged libel. The court say: "The employment of competent editors, the supervision, by proper persons, of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blame-worthiness of a publisher to a minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. And no amount of express malice in his employees should aggravate damages against him, when he has thus purged himself from blame." "While, therefore, in the present case the reporters were guilty of carelessness in receiving hearsay talk of legal charges, which could only be lawfully published in accordance with the documentary facts, and while there could be no justification for publishing outside scandal against an individual from any source whatever, yet the defendants were only responsible beyond the damages recoverable under any circumstances, for such a libel to the extent of their own conduct in the case, or want of care used in guarding their columns against the insertion of such articles."

In the case of Railroad Co. v. Baum, before cited, the court say: "But when the act is unnecessary to the performance of the master's service, and not really intended for that purpose, but is done by the servant to gratify his own malice, though, under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is not, therefore, liable." "Under these circumstances, last enumerated, it is not easy to perceive, in the nature of things, any just reason for holding the master responsible. It will not do to say he shall answer in damages, because by employing the servant he gives him opportunity to maltreat those with whom he comes in contact in discharging his duties, that reason would hold the shop-keeper for any outrage committed by his clerk upon a customer; the merchant for the like conduct of his journeyman; and, indeed, it would be equally applicable to almost every department of business in the conduct of which it is necessary or convenient to employ assistants to deal with the public. Even the inn-keeper, whose cook feloniously mingles poison with the food of a guest, must then respond in damages."

In Kleen v. Railroad Co., 37 Cal. 400, the court say: "As to the general rule upon that subject there can be no doubt. If the act of the conductor, in pulling the plaintiff off the cars was a wanton and malicious act, committed out of the course of his agency, the defendant cannot be held responsible for the manner in which he did it, unless, however, the defendant expressly authorized the act."

In the case of The Amiable Nancy, 3 Wheat. 546, which was a suit for a marine trespass, Mr. Justice Story, in delivering the opinion of the court, among other things says: "Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage without any just provocation or excuse; under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet further and visit upon them, in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of a privateer upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet from the nature of the service they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."

In Wardrobe v. Stage Co., 7 Cal. 118, the jury found for actual and exemplary damages in the sum of $2,500. The chief justice, in delivering the opinion of the court, quoted with approval the opinion of Judge Story in The Amiable Nancy, and said: "When it appears that the coach at the time of the accident was driven by a servant or agent of the owner, the rule in such case is, that the principal is liable only for simple negligence, and that exemplary damages cannot be enforced against him."

In the case of Moody v. McDonald, 4 Cal. 297, the facts were similar to the above, and in the action brought against the principal for tortious acts of his servant, where the jury gave $2,500 damages, and $2,500 smart-money, the court disallowed the verdict for the smart-money, holding the principal liable only for compensatory damages.

In McLellan v. Bank, 24 Me. 566, the court say: "The first question obviously presented by the case is, can a corporation aggregate be chargeable with malice? Such corporations have been held answerable in trover; and might, perhaps, in other actions sounding in tort for all acts done by their officers under circumstances implying authority to do them. But it may well be doubted if such corporations can be implicated by the acts of their servants in transactions in which malice would be necessary to be found in order to the sustaining an action against them therefor."

Two cases are cited by Mr. Justice WALTON as sustaining the rulings of the presiding judge; one in New Hampshire, and one in Mississippi.

In the case in New Hampshire (Hopkins v. Railroad Co., 36 N. H. 1) the ruling complained of was, "That if the jury should find the defendants guilty of gross negligence at the time of the collision, and the plaintiff's injury was occasioned by such negligence, they might in their discretion give exemplary damages."

"To this instruction two objections are made:

(1) That it is not a case for exemplary damages, because the negligence, which is the foundation of the suit, was the negligence of the defendant's servants;

(2) Because the facts of the case disclose no fraud, malice, violence, cruelty, or the like, nor any turpitude or moral wrong."

Upon the last point, the court hold that "gross carelessness in such case implies a heedless disregard for human life, and for the safety of passengers who intrust themselves to the care of the road, which brings the case very strongly within the rule that the wrong complained of, to warrant exemplary damages, must have something of a criminal character."

In relation to the first objection the court say: "The defendants are a corporation, and can act in no way but by their officers, agents, and servants; and when their officers, agents, or servants act within the scope of their authority and employment, it is the act of the corporation, and their negligence is the negligence of the corporation;" and they cite Ang. & A. Priv. Corp, 386, and Chestnut Hill Turnpike v. Rutter, 4 Serg. & R. 6.

It will be noticed that the learned chief justice, who drew this opinion, makes only such acts of the agent, as are authorized by the corporation, their acts. It is such as are within the scope of their authority as well as employment. He does not say that unauthorized acts by the agent become the acts of the principal. His proposition conforms to the rules which we have before deduced from the authorities. A recurrence to the authorities, cited by him, will show this. Section 386, Ang. & A. Priv. Corp., which is cited, reads as follows: "Yet it is somewhat remarkable that the question whether an action of trespass would be against a corporation should not, until within a very late period, have been the subject of express judicial decision. In the case of Maud v. Canal Co. it was expressly decided by the English court of common pleas, in 1842, that trespass will lie against a corporation. The action was brought for breaking and entering locks on a canal, and seizing and carrying away barges and coal. The trespasses, it was proved, had been committed by an agent of the company, which was incorporated by an act of parliament, and the barges and coal, it appeared, had been seized for tolls claimed to be due them. The only question being whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of their authority. The court held, that when it is established that trover will lie against a corporation, there could be no reason why trespass should not also lie against them; that it was impossible to see any distinction between the two actions."

This section which is cited relates alone to the question whether or not trespass can be maintained when the act done was within the scope of their authority; that is the authority conferred by the corporation, and it is held, when the act is done by the authority of the corporation, it is the act of the corporation, and trespass will lie.

The next section, save one, which follows (388) says: "It is of importance, however, to be observed, that an action of trespass cannot be sustained against a private corporation for an act done by one of its agents unless done communicato consilio, or, in other words, unless the act has been directed, suffered, or ratified by the corporation. A corporation is liable for an injury done by one of its servants in the same manner and to the same extent only as a natural individual would be liable under like circumstances. The well-known rule of law is, that if the cause of an injury to a person be immediate, though it happens accidentally, the author of it is answerable in trespass as well as in case; but a master, whether a natural individual or an artificial one, is not liable for a willful act of trespass of his servant."

With these authorities before him we cannot well suppose he meant to include any unauthorized act of the agent. He was too good a lawyer to say that an act done against the master's orders and directions was the act of the master. Did these, however, leave us in doubt, what follows upon the same page of his opinion would seem to put the matter at rest, for he proceeds to say: "Corporations may be sued in trespass for the authorized acts of their servants; and if the trespass is committed by their authority, with circumstances of violence and outrage such as would authorize exemplary damages against an individual defendant, it is not easy to discover any ground for a different rule of damages against the corporation which the law charges with the consequences of the act as the responsible party. If a corporation like this is guilty of an act or default such as, in case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation."

This we understand to be in harmony with all the authorities, and comes within the first class of cases to which I have referred. The act is theirs, because done by their authority. Being theirs, they are held as would be an individual defendant. If unauthorized, it is not their act, although they may, upon other principles, be liable to compensate for the injury done.

The ground upon which exemplary damages is allowed is, that the trespass is committed by their authority with such circumstances of violence and outrage as would authorize exemplary damages against an individual defendant. I regard the law, as stated by the chief justice, as directly sustaining the views that I present, viz.: that to be chargeable with the animus of the transaction, it must be theirs by previous authority, direct or implied, or subsequently adopted or ratified by them. The instruction in the court below required the defendants to be guilty of gross negligence to subject them to exemplary damages; and the sum total of the decision was that this was right, and that if the act was done by the authority of the defendants, it was the act of the principal. What evidence there was, if any, that the defendants participated in the act which produced the injury, does not appear; nor does it appear that the jury found the defendants were guilty of gross carelessness. All the remarks of the chief justice are made upon the hypothetical case of an injury happening through the gross carelessness of the defendant corporation.

The case in Mississippi came before the court on a motion to set aside the verdict. The discussion in the opinion is upon the propriety and authority of the court to set aside verdicts on account of the amount of damages in those cases where there is no fixed rule of computation, and the authorities cited are almost all of them upon this point. There was no ruling excepted to, and no question of law presented. Upon the matter of punitive damages, referred to by Judge Walton in his opinion, they say: "The case is much stronger for the defendant in error, than were the facts in the case of Heirn v. McCaughan, 32 Miss. 18. The decison in that case was conclusive in this, as to the form of action as well as the right of the jury, in such cases, to protect the public, by punitive damages, against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It will be perceived that this case, so far as any consideration of punitive damages was concerned, was regarded as settled by the case in 32 Miss.

Looking at that case I find it was an action brought for an act done by a partner. Heirn with others were owners of a vessel. Grant, one of the owners, was the captain. The court say, by Hand, J.: "There was testimony tending to show that the captain in charge of the boat, which was published to stop at Pascagoula at the time specified, willfully and capriciously disregarded the obligation incurred by the publication, and that the failure occasioned great bodily exposure, and mental suffering and disappointment to the plaintiffs (now defendants); these circumstances were properly submitted to the jury, to be considered by them, with the circumstances of excuse or extenuation relied upon by the defendants; and it was their province to determine whether there was such fraud or willful neglect of duty causing oppression to the plaintiffs, and under such circumstances of aggravation as to warrant exemplary damages. This was the substance of the rulings of the court upon this point, and we perceive no error in them."

This is the case which decided all that was said in 36 Miss. about punitive damages, and was an action brought against several partners for the act of one of them. The value of this case, in support of the principle that a railroad corporation may be punished for the malice of an employee, cannot, I think, be considered great, especially when, in the case in the 36th, we find this remark: "It is not enough that, in the opinion of the court, the damages are too high. It may not, rightfully, substitute its own sense of what would be a reasonable compensation for the injury, for that of the jury." Since the opinion in this case was drawn, and since writing this opinion, my attention has been directed by Mr. Justice WALTON to the case of Railroad Co. v. Blocher, 27 Md. 277, as a case sustaining the ruling of the court in the case at bar.

Upon an examination of that case, it will be found that a difficulty arose between the conductor of train upon the appellant's road and appellee about his ticket; the one contending it had been surrendered to the conductor, and the other averring it had not, and to prevent being put off the train, the appellee paid his fare; it subsequently appeared that he was right, and properly surrendered his ticket when called upon so to do. He alleged that the conduct of the conductor was violent and insulting.

At the trial of the case, the appellants requested the court to instruct the jury as follows:

"(7) If the jury believe the conductor caught the appellee violently, etc., by the collar and dragged him from his seat, while a passenger in the train, the appellee is not entitled to recover for the same in this action against the appellants, unless they believe the appellants authorized the act, and adopted and justified it since its committal.

"(8) That if the jury believe the conductor wrongfully extorted from the appellee the fare from Martinsburg to Baltimore, after the appellee had surrendered his ticket, etc., the appellee was not entitled to recover vindictive or punitive damages from the appellants, unless they expressly or impliedly participated in the tortious act authorizing it before, or approving it after, it was committed."

Concerning these two requests, the court say: "The conductors and employees of the corporation represent them in the discharge of these functions, and being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission. Vide Redf. R. R. 381, note 6, and authorities there cited. The court was, therefore, right in rejecting so much of the defendants' prayers, as limited their liability to such tortious acts of their agents as they had either personally authorized or subsequently approved."

The seventh and eighth prayers, requiring the plaintiff to prove either previous authority or subsequent approval of the acts of the conductor to render the defendant liable, were rejected for reasons before assigned (those above copied). "The prayer of the appellee claims compensation for injury to his feelings and degradation of character. The appellant's eighth prayer affirms he is not entitled to recover vindictive or punitory damages against the company, unless they expressly or impliedly participated in the tort, by authorizing it before, or approving it after. We have already declared our opinion on the latter branch of this proposition. This court, in the case of Gaither v. Blowers, 11 Md. 552, said, that where the injury was accompanied with force or malice, the injured party might recover exemplary damages. The action being vi et armis, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of. 2 Greenl. Ev. §§ 89, 254; McNamara v. King, 2 Gilman, 436; McTavish v. Carroll, 13 Md. 439."

This is all that is said upon this question. I have quoted the requested instructions, and the remarks of the court upon them. The conclusion of the court, and the law of that case, is found in these words: "The action being vi et armis, or in that character, the jury were authorized to give whatever damages the evidence showed the immediate consequences of the wrong warranted, and which necessarily resulted from the act complained of."

A careful examination of that case will disclose the fact that the question of damage raised and decided, was whether the plaintiff had a right in such case to recover "for injury to his feelings, and degradation of character." This was the prayer of the appellee, and he asked no more, and no other instruction was given. These were treated as exemplary damages by the appellants, and they sought, by their request, to limit the damages to the actual physical and pecuniary injuries. An examination of the authorities cited by the court in their opinion will lead to the conclusion that they regarded that as the question, and considered such damages exemplary damages. They cite Mr. Greenleaf for the rule they lay down, and I hazard the opinion that Mr. Greenleaf never expected to be quoted as an authority for punitive damages in civil actions. (See his note to section 253, volume 2, on Evidence.) The case of Gaither v. Blowers, referred to, goes no further than Mr. Greenleaf, and his language, totidem verbis, is used as the authority for the doctrine advanced.

Mr. Greenleaf, in the note referred to,

speaking of the term "exemplary damages," as used by the courts in a case he is reviewing, says: "From this and other expressions it may well be inferred, that by actual damages the court meant those which were susceptible of computation, and that by exemplary damages or smart-money they intended those damages which were given to the plaintiff for the circumstances of aggravation attending the injury he had received, and going to enhance its amount, but which were left to the discretion of the jury, not being susceptible of any other rule."

The rulings, in the case at bar, covered all these intangible matters before reaching the point of punishing the defendant corporation. They had been told "to consider the injury to his feelings, his wounded pride, his wounded self-respect, his mental pain and suffering occasioned by the assault, and the feeling of degradation that necessarily resulted from it." This was going as far as the court in Maryland went or was asked to go, and does not reach the ground of complaint in the case at bar. I find no evidence in it of a design to go beyond this; the rule was declared in plain terms to be such damages as "the evidence showed the immediate consequence of the wrong warranted, and which necessarily resulted from the act complained of." This certainly does not include damages by way of punishing the defendants. Such damages would not be the immediate consequence of the wrong, and necessarily resulting from it.

Some comment is made concerning the retention of Jackson in the defendant's employ. All that I find, in the report of the case concerning the matter, is a statement, made by the plaintiff in his testimony, that he had seen him several times since, in performance of duties upon the train.

So far as any question arises upon the rule of damages laid down in the instruction, it is quite apparent this is perfectly immaterial, and could be regarded, in any event, only as remote evidence of ratification. If he was retained in their employ, we do not know under what circumstances; possibly they were such as would have furnished to the mind of any reasonable man a perfect justification; sitting here, we must take the report as we find it. The opinion states that the jury undoubtedly regarded it as "a practical ratification and approval of his conduct." Could they have done so if they had been correctly instructed in the theory now advanced? What was there to ratify? Yea, more, who was there to ratify? If the servant is the corporation, and the act of commission was the act of the corporation, was there anything to ratify? Was it not an original act of the corporation? Did they ratify their own act? If the act of commission was originally theirs, the act of retention was a subsequent act, having no relation to the first. Did that infringe any right of his? If it did, it was a new and substantive cause of compaint not embraced in this declaration. If, however, the theory which is now advanced is not only novel but unsound, and that previous command or subsequent approval was necessary to warrant the infliction of punishment, the matter was of vital importance, and the defendants should have had the advantage of the instruction. It is not quite right, I think, to now assume that the jury regarded it as a ratification. Possibly the gentlemen composing that jury were not quite prepared to find that the gentlemen composing the administrative and executive departments of that corporation were so lost to all that is decent and honorable among men, and so blind to their own interests that they would justify an act condemned by everybody. Giving full force to the encomiums bestowed in the opinion upon juries, might we not conclude that they would be more likely to infer, from the circumstances, that such amends had been made as honorable gentlemen would require, rather than convict them of an act that any prison convict would cry out against?

Will it do to shield the verdict with that which the jury were substantially told was immaterial?

I have not considered this case upon the motion, or upon any facts supposed to be proved by the evidence reported, nor have I considered the question whether, under the plaintiff's declaration, he can recover upon the grounds set forth in the opinion. I have only considered the rule advanced by the instructions. Under this rule a railroad corporation may exercise all possible care in the selection of servants, and strictly enjoin them from day to day against any irregularity of conduct; yet if one of them, unmindful of his duty, regardless of his master's interest, and bent on exercising some private malice against a person who happened to be a traveler, assaults him, the corporation must not only make full compensation for all the injury, under the most liberal rules, but may be punished for an act they have used every endeavor within the reach of human power to prevent. One committed by another, against their wishes, interest, and positive commands; and it is to be such a punishment as will "serve as a warning and example to others."

If we were punishing the actor himself, we should consider the probable effect of a given punishment upon him; but when, for his offense, we punish another, how can we form any idea of the influence of a punishment he cannot feel. The master may discharge him from his employment, and he thus feel the punishment another suffers indirectly, and to that extent. It will be perceived, however, that this is the extent for all classes, kinds, and degrees of offense. It is the only channel through which he can be made to feel it. But suppose it were otherwise, is the punishment which is inflicted upon the innocent party any the less keen, unjust, and onerous? Is that in any degree affected by the manner in which the offender receives the intelligence of its infliction upon another? Again; how shall the corporation avoid the constant recurrence of penalties for the offenses of others? Can they, when they select another servant, exercise any more care or be more watchful over him? Can they change the passions of men? What is their fault if they have exercised all the care, wisdom, and prudence with which men are invested? Must they be punished for not being omnipotent?

If the idea and design of punishment is to restrain the offender and make the punishment serve as a warning to others, how can it better be done than by making it personal; inflicting it upon the offender? How can its influence upon others be made more restraining than by the reflection that they must personally suffer the same punishment if they offend? Is the reflection that others will suffer it, more potent with that class of individuals? Has the observation of men led to this conclusion? And if it has, have all the principles of reason, right, and justice yielded to it and made it right?

If the punishment, thus inflicted, is to serve as a warning to others, who must take warning? Evidently the innocent as well as guilty. The innocent are to be the greatest sufferers by reason of the offense, and punished alone directly. It is to serve as a warning to all innocent persons, that they may be punished for the offenses of others, after having fully compensated the injury done.

One other consideration I barely suggest. The liability in this case is based upon a contract; purely so. No liability could, under the proof, arise by the rules of law applicable to master and servant. Had the plaintiff been a stranger to the defendants, and had no claims upon them, except such as each citizen owes to the other, no liability of any kind would have attached to these defendants for the willful trespass of their servant. Not only would they be saved punishment, but compensation even. Now it being a case where no liability would attach, but for the contract, and the liability which does attach being for breach of contract, the rule in this case is not only punishing one for the act of another, but it is doing this in an action ex contractu, for this declaration must be construed to be such to meet the law of the opinion.

All consideration of the matter tends to show the fundamental error in holding an innocent party liable to punishment. In all these acts, done by the command of the principal (whether the authority appears by direct command or by fair implication from the proceedings of the party charged), there is propriety in punishing if the act be wrong and an infraction of the moral code; but in those cases where the act is unauthorized, and the principal is in nowise connected with the animus of the actor, and becomes liable to compensate upon grounds other than that the act was done by his command, it appears to me that all punishment inflicted, or rather all suffering imposed under the name of punishment, is flagrant injustice; it is not punishment, for it has not its necessary antecedent, wrong: both reason and authority are opposed to it, and no case can be found, where the question has been presented and discussed, in which such doctrines are not denounced as unsound and unjust. In addition to the cases which I have cited, there is the pregnant fact that no case can be found in Massachusetts or New York where it has ever had any sanction, even in the inferior courts; and no case can be found, that I am aware of, where any party has sought to establish any such rule by an appeal to the superior courts or courts of last resort in those states. Yet these states are a net-work of railroads, and questions of liability are constantly arising and being settled by the courts of those states. It appears to me the fact has some significance.

The rule established in this case is so important, and fraught with such results under the ordinary modes of administering law, that I have felt impelled to enter my dissent at length, and regret that the pressure of other duties has prevented me from giving a more extended examination of the authorities, and the compression of them and my own views into a narrower compass.

WHEELER & WILSON MANUF'G CO. et al. v. BOYCE.

(13 Pac. 609, 36 Kan. 350.)

Supreme Court of Kansas. April 8, 1887.

Error from Shawnee county.

Waters & Ensminger, for plaintiffs in error. G. N. Elliott, for defendant in error.

JOHNSTON, J. This is a proceeding to reverse a judgment rendered in an action for false imprisonment, brought by Jacob F. Boyce against the Wheeler & Wilson Manufacturing Company, C. S. Baker, and J. W. Hughes. Hughes was dismissed from the action, and the judgment went only against the plaintiffs in error. The facts upon which the case was disposed of are substantially these: The Wheeler & Wilson Manufacturing Company, a corporation organized for the manufacture and sale of sewing-machines, was engaged in business at Topeka, Kansas, and C. S. Baker was its general agent at that place. The company had sold a sewing-machine to Mary Hatfield, who subsequently married Jacob F. Boyce, the defendant in error. She paid a part of the purchase money, and signed a contract, in substance that the title to the machine should remain in the company until the balance of the purchase money was paid. In November, 1881, the company directed its general agent to bring an action of replevin against Mary Boyce to recover the machine, claiming that there was a balance due thereon, a claim which she denied. An action of replevin was begun before a justice of the peace, and a writ was issued and placed in the hands of Constable Hughes, who reported that he had made search for the machine, and was unable to obtain possession of it. C. S. Baker, the agent of the company, then directed Hughes to make and file an affidavit before the justice of the peace, alleging that Mary Boyce and her husband, Jacob F. Boyce, were in possession of the machine, and had refused to deliver it to him, and thus obtain a warrant for their arrest. This was done, and the justice issued a warrant to the constable commanding him to arrest Boyce and his wife, and commit them to the Shawnee county jail, there to remain until they should deliver the machine. Under this warrant, Jacob F. Boyce was arrested and placed in jail without being taken before the justice, and without any examination, hearing, or trial. The constable informed the general agent of the company that he had arrested Boyce, and placed him in the county jail as requested, and Baker replied: "Now, I guess he will give up the machine." The replevin action resulted in a judgment in favor of Mary Boyce. Jacob F. Boyce was held in the county jail for 10 days, and was never taken before any court or officer for examination or trial, and was finally discharged at the instance of the plaintiffs in error, and he became sick in consequence of his confinement. He at once instituted this action, and the jury awarded him damages in the sum of $1,000, and the verdict was approved by the trial court.

The plaintiffs in error complain chiefly of the rulings of the court in the matter of charging the jury. The jury were instructed that, if the evidence justified it, they could find exemplary damages or smart-money against the defendants. After the jury had been out some time, and had practically agreed upon their verdict, the court recalled them, and advised them that he was in error in giving the instruction that they might in their discretion assess exemplary damages, and withdrew it from the jury, telling them that in their deliberations they should not consider the instruction withdrawn. Objection was made to the withdrawal of the instruction, and an application of plaintiffs in error for leave to address the jury after the modification had been made was denied, and this ruling is assigned as error. This decision affords the plaintiffs in error no ground for complaint. The action of the court was favorable rather than prejudicial to their interests. The instruction given was predicated upon sufficient facts, was warranted under the law, and the defendant in error alone had reason to complain of its withdrawal. It is a well-established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention, such as false imprisonment; and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the corporations for which they acted. This principle is too well settled to require argument, and the authorities sustaining it are numerous and well-nigh unanimous. Railroad Co. v. Slusser, 19 Ohio St. 157; Railroad Co. v. Dunn, 19 Ohio St. 162; Goddard v. Railway, 57 Me. 202; Railroad Co. v. Quigley, 21 How. 213; Railroad Co. v. Arms, 91 U. S. 489; Railroad Co. v. Bailey, 40 Miss. 395; Railroad Co. v. Blocher, 27 Md. 277; Hopkins v. Railroad Co., 36 N. H. 9; Railroad Co. v. Hammer, 72 Ill. 353; Reed v. Bank, 130 Mass. 443; Fenton v. Machine Co., 9 Phila. 189; Goodspeed v. Bank, 22 Conn. 530; Boogher v. Association, 75 Mo. 319; Wheless v. Bank, 1 Baxt. 469; Jordan v. Railroad Co., 74 Ala. 85; Williams v. Insurance Co., 57 Miss. 759; Vance v. Railway Co., 32 N. J. Law, 334; Cooley, Torts, 119; 3 Suth. Dam. 270, and cases cited; 2 Wait, Act. & Def. 447, and cases cited. The same doctrine has been fully recognized on several occasions by this court. Railroad Co. v. Rice, 10 Kan. 437; Railway Co. v. Weaver, 16 Kan. 456;

Railway Co. v. Kessler, 18 Kan. 523; Railway Co. v. Little, 19 Kan. 269; News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786. The withdrawal of the instruction, although erroneous, was beneficial to the plaintiffs in error, and there can be no reversal unless the erroneous ruling is injurious to the party complaining.

It is next contended that the company cannot be held liable for the wrongful acts of Baker and the constable, and an instruction is challenged which holds that, if the agent of the company caused and procured the illegal arrest and detention of the defendant in error as charged, the company and its agents were both liable. Baker was the managing agent of the company; his authority was general, and the constable acted wholly under his direction and sanction. He had not only authority to sell machines, and collect the money due for the same, but it is conceded that he had authority to institute legal proceedings to recover possession of the machines conditionally sold, and for which payment had not been made in accordance with the terms of sale. The arrest and detention of Boyce was incidental to the replevin action, and was made, as alleged, to compel the delivery of the machine under a provision of the Justices' Code relating to replevin, which provides that where the defendants, or any other persons, knowingly conceal the property replevied, or, having the control thereof, refuse to deliver the same to the officer, they may be committed until they disclose where the property is, or deliver the same to the officer. Comp. Laws 1879, c. 81, § 69. He had full authority to represent the company, and whatever was done by him was done for the benefit of the company, and for the accomplishment of its purpose. His act, although wrongful, was in the line of his employment, was done in the execution of the authority conferred upon him, and must be regarded as the act of the company. To make the corporation responsible, it is not necessary, as plaintiffs in error contend, that the principal should have directly authorized the particular wrongful act of the agent, or should have subsequently ratified it. Judge Story, in treating of the liability of principals for the acts of their agents, says that "the principal is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of such misconduct, or even if he forbade or disapproved of them," and to sustain this he cites numerous authorities. "In all such cases," he says, "the rule applies, respondeat superior, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents." Story, Ag. § 452.

They complain, further, of an instruction in which the court stated that the warrant under which Boyce was taken and held in custody was illegal and void, and insufficient in law to justify his arrest and imprisonment. The warrant, as we have seen, was issued upon an affidavit charging Boyce with having control of the property replevied, and of refusing to deliver it to the officer who had the writ. There was no process issued except the warrant, and it commanded that he be committed at once to the county jail until he should deliver the property to the officer. No notice was given to him that the charge stated in the affidavit had been made against him, nor was an opportunity given him to refute it. The order of commitment was not based upon any examination, hearing, or trial, but was arbitrarily made, in the absence of Boyce, upon ex parte statement. The plaintiffs in error attempt to justify this action, though not seriously, we think, under section 69 of the Justices' Code, already referred to, which reads as follows: "Whenever it shall be made to appear, to the satisfaction of the justice, by the affidavit of the plaintiff or otherwise, that the defendant, or any other person, knowingly conceals the property sought to be recovered, or, having control thereof, refuses to deliver the same to the officer, the justice may commit such defendant or other person until he or they disclose where such property is, or deliver the same to the officer." The proceeding authorized by this statute is virtually one for the punishment of contempt. Whether a party is to be brought before the justice of the peace upon a notice or by attachment, or what the initial proceeding shall be, is not expressly provided. The section quoted does provide what punishment shall finally be visited upon a party; but this punishment is not to be administered until the guilt of the party is "made to appear to the satisfaction of the justice." This language implies that there is to be a hearing and an adjudication of the charge upon its merits. When a contempt is committed in facie curiæ, the punishment is generally summary, and no initial proceeding is required; but, when it is not committed in the view of the court, the initial proceedings are necessary, and the party must have notice and opportunity to defend. The most common initial process is a rule or order to show cause why an attachment or warrant for contempt should not issue, of which service should be made; and, in a proceeding to punish for criminal contempt, personal notice of the accusation is indispensable. Whatever procedure may be adopted, it is certain that a party cannot be condemned without notice; and a final judgment rendered, as was done in this case, without a hearing or an opportunity to defend, is void. Rap. Contempt, § 96. While the language of the statute is not very explicit, it does not require the interpretation contended for, and, if it did, it would necessarily be held void.

The final error assigned is that the damages awarded are excessive. This assignment is as groundless as those already considered. The case is an aggravated one, and the conduct of the plaintiffs in error exhibited a wanton and reckless disregard of the rights of the defendant in error. He was not a party to the replevin action, and the testimony is that the machine in controversy was purchased long before he was married to the plaintiff in that action, and that he had no interest in or control over it. He was thrust into jail, without warning or trial, when there was no civil or criminal suit pending against him, and kept there for 10 days with 17 or 18 prisoners who were either charged with or convicted of crimes. The sewing-machine sought to be recovered from his wife had been paid for, and belonged absolutely to her; and plaintiffs in error, with knowledge of this fact, undertook to compel the payment of money not due, or the recovery of property which they did not own, by the arrest and incarceration of the defendant in error, without cause, and in a manner that was clearly illegal. Apart from the loss of time and interruption to his business, as well as the humiliation and indignity suffered by him by being thrust into jail upon a false charge, it appears that the confinement resulted in his sickness; and when we consider the malicious and oppressive conduct of the plaintiffs in error, and that the case is one which calls for the infliction of exemplary or punitive damages, we can only conclude that the verdict of $1,000 in favor of the defendant was fully justified, if not too small. We can say without hesitation that an award of a larger amount would not have been disturbed on the ground that it was excessive.

It follows that the assignments of error must be overruled, and the judgment of the district court affirmed.

All the justices concurring.

LOUISVILLE & N. R. CO. v. BALLARD.

(3 S. W. 530, 85 Ky. 307.)

Court of Appeals of Kentucky. March 5, 1887.

Appeal from circuit court, Marion county.

Wm. Lindsay and Rountree & Lisle, for appellant. Hill & Rives, for appellee.

HOLT, J. The appellee, Lou. E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another, upon a passenger train of the Louisville & Nashville Railroad. It failed to stop at the platform at her place of destination, which was a flag station. It was a down grade at that point, and there is some evidence tending to show that the car brakes did not operate well, in consequence of which the train ran some 50 or 60 yards beyond the platform, where it was stopped, and the station then announced by the proper person, but the appellee did not get off the train. Upon the other hand, there is testimony tending to show that this stop was not made, and that no effort was made to stop the train, until it was done at the request of the appellee, at a point between her destination and the next station. The weight of the evidence shows that the conductor then informed her that she could either go on to the next station, or he would stop the train and she could get off there; and that, upon his so telling her the second time, he did stop it, and she got off at that point, which was a lonely place, and about a mile beyond her station.

She says that the conductor "seemed very impatient, and his tone was rather rough for a gentleman;" that he did not assist her in getting off with her baggage, which consisted of a valise and bundle; and that, as she jumped from the lower step of the platform to the ground, he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and "grinned." Upon the other hand, there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner. There was no request upon her part that the train should be backed to her station, but this should have been done, under the circumstances. The appellee was compelled to walk back to her station, and from thence, three-quarters of a mile, to her home, in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week. The jury in this action by her for damages returned a verdict for $3,000.

Manifestly it cannot be sustained upon the ground that it did not include exemplary damages, and was compensatory only, for a breach of the contract for transportation. If upheld, it must be upon the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by proper instructions. They were told: "If the jury believe from the evidence that the defendant's agents or employés, or any of them, in charge of defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad, the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, pro hac vice, is vested in them, and as to passengers in transitu they should be considered as the corporation itself. It is therefore as responsible for their acts in the conduct of the train, and the treatment of the passengers, as the officers of the train would be for themselves, if they were the owners of it. Public interests require this rule. They also demand that the corporation should be and it is liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employés in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences. Dawson v. Louisville & N. R. Co., 6 Ky. Law Rep. 668.

As to female passengers the rule goes still farther. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach. Com. v. Power, 7 Metc. (Mass.) 596; Craker v. Railway Co., 36 Wis. 657; Nieto v. Clark, 1 Cliff. 145, Fed. Cas. No. 10,262; Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575.

It was improper, however, to instruct the jury, as was in effect done in this instance, that "indecorous" conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction. It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages, cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation," (Chiles v. Drake, 2 Metc. [Ky.] 146;) or if a trespass be "committed in a high-handed and threatening manner," (Jennings v. Maddox, 8 B. Mon. 430;) or where the tort is "accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice," (Parker v. Jenkins, 3 Bush, 587;) or, as was said in

Dawson v. Railroad Co., supra, where the wrongful act is accompanied by "insult, indignity, oppression, or inhumanity."

It would, however, be extending the rule unwarrantably to hold that they could be imposed provided the conduct was merely "indecorous." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next one, or in merely telling her that she could walk back to her station; yet none of these things amounted to "insult, indignity, oppression, or inhumanity."

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory, and what sum as exemplary damages. They involved mixed questions of law and of fact. Upon a retrial the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Besides, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whetner he was guilty of improper conduct or not, but it was a part of the res gestæ, and therefore admissible. Any circumstances attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence, with a view of affecting the question of damages, save where they within themselves constitute an independent cause of action. Sedg. Dam. side p. 538, note 3.

For the reason indicated, the judgment below is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

SOUTHERN KANSAS R. CO. v. RICE.

(16 Pac. 817, 38 Kan. 398.)

Supreme Court of Kansas. Feb. 11, 1888.

Error to district court, Johnson county; J. P. Hindman, Judge.

Action brought by Benjamin Rice against the Southern Kansas Railroad Company on October 31, 1885, to recover as damages the sum of $1,000 for being unlawfully assaulted and ejected from a passenger car by the conductor thereof while returning from Kansas City, Missouri, to Olathe, in this state; the plaintiff at the time having a ticket to ride as a passenger in the car. Subsequently the railroad company filed an answer containing a general denial. Trial had at the March term, 1886. The jury returned a verdict for the plaintiff, and assessed his damages at $117.46, and also made the following special findings of facts: "(1) Did the conductor act willfully, and in a grossly negligent manner, in putting the defendant off the train? Answer. He willfully put him off the train. (2) Did the conductor act with a reckless disregard of the plaintiff's rights? A. Yes. (3) Did the plaintiff state to the conductor that he had purchased his ticket the day before, and could the conductor have easily ascertained that fact from the passengers who were acquainted with plaintiff? A. In this case he could. (4) How much do you allow plaintiff as exemplary damages? A. $71.75." "First. How much do you allow plaintiff for pecuniary loss? A. $.71. Second. Was plaintiff injured in person by the conductor? A. No. Third. How much do you allow plaintiff for injury to his person? A. Nothing. Fourth. Did plaintiff lose any time by reason of defendant's conductor refusing to honor his ticket, and, if so, how much? A. No. Fifth. How much do you allow plaintiff for loss of time? A. Nothing. Sixth. How much do you allow plaintiff for inconvenience in going from his seat to the platform and back again? A. Nothing. Seventh. Was plaintiff treated in an insulting or brutal manner by the conductor? And, if so, state fully how. A. An insulting manner. Eighth. How much, if anything, do you allow plaintiff for injury to his feelings? A. $10.00. Ninth. How much, if anything, do you allow plaintiff for expenses, attorney's fees, or time in prosecuting this case? A. $35.00." The defendant filed a motion to set aside the verdict of the jury, and for a new trial, which was overruled. Subsequently, judgment was entered upon the verdict. The railroad company excepted, and brings the case here.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. John T. Little and Samuel T. Seaton, for defendant in error.

HORTON, C. J. (after stating the facts as above). On October 29, 1885, Benjamin Rice, a colored man, purchased of the ticket agent of the Southern Kansas Railroad Company at Olathe, in this state, for 50 cents, a limited railroad ticket to Kansas City, Missouri, and return, good for three days; the date of issue being stamped on the back. On that day he was carried as a passenger by the railroad company upon one of its passenger trains from Olathe to Kansas City. The "going coupon" of the ticket was torn off, and taken up by the conductor of the train. On the next day, October 30th, Rice, desiring to return to Olathe, boarded one of the passenger trains of the company, which left Kansas City about 10 o'clock p. m., and, when the conductor called upon him for his fare, presented the "return coupon" of the ticket, which he had purchased the day before. The conductor took it to the light, and, after examining it, handed it back to Rice, saying it was not good, and informed him that he could not honor it. Rice insisted that the ticket was good, and said to the conductor that he had purchased the ticket the day before, and that he (the conductor) had carried him upon the ticket to Kansas City on that day. Another passenger also stated to the conductor, at the time, that he had seen Rice purchase the ticket on the 29th. The conductor replied that he could not honor the ticket, and subsequently took hold of Rice's coat-collar, and led him out of the car. Rice had no money to pay any extra fare; and when he was off the car, or about to get off, a friend gave him 75 cents, which he gave to the conductor, who returned him 5 cents, punched a receipt for his fare, and permitted him to ride to Olathe.

On the part of Rice, it is contended that the ticket he presented showed plainly on its back that it was stamped at Olathe on the 29th of October; that he told the conductor that he did not have any money to pay any more fare; that he was quietly in his seat as a passenger when ordered by the conductor to leave the train; that he did not make any forcible resistance to the orders of the conductor; but that the conductor took him out of the car, and off upon the steps of the platform. On the part of the railroad company, it is claimed that the ticket had been folded up and creased at the date; that the conductor took it to the light, and examined it carefully; that the date was obliterated; that the ticket looked so old and worn that the conductor believed it had expired; that he informed Rice that the ticket was not good, and that he could not ride upon it, but would have to pay fare; that, when the train reached Holliday, the conductor inquired of Rice what he was going to do; that Rice then refused to pay fare or get off the train; that the conductor then took hold of Rice's coat-collar, and led him to the platform of the station, or to the last step of the car; that then a friend told Rice to come back, and he would give him money to pay his fare; and the conductor permitted Rice to take his seat and ride to his destination; that, when Rice was informed that he would have to pay his fare or leave the car, it was his duty to do one or the other; that he should have paid his fare, and relied upon his remedy to recover it back; that, if he could not do this, he should have quietly left the train, and not provoked or made necessary an assault; that therefore he should have recovered only 71 cents, that amount being the sum assessed by the jury for his pecuniary loss.

The railroad company asked instructions which tended to limit the amount of damages that Rice was entitled to recover to the exact fare paid by him, with interest thereon. The court refused to give these instructions, but directed the jury, among other things, as follows: "I instruct you that if you find the plaintiff presented to the conductor for his passage a limited ticket, good only for three days from the date of its sale; and that the conductor, from the mutilated and worn condition of the ticket, was unable to read the date on the ticket, and honestly believed that the ticket was an old one, and not good; and for this reason, and without any unnecessary force or indignity to the plaintiff, required him to pay his fare or get off, and did, upon refusal and failure to pay fare, remove said plaintiff without any unnecessary force, and without injury to his person, to the platform of the car, or to the platform or ground at a regular station; and then plaintiff paid his fare, and continued his journey on the same train, and without delay,—then, if you find as a fact that the ticket presented by plaintiff was a good and valid ticket, and that the conductor had no right to collect this fare from the plaintiff, you must find a verdict for the plaintiff, and the measure of his damages would be the amount of fare paid by him, with interest at seven per cent. per annum from October 30th, 1885, and actual compensation for the injury and outrage, if any, suffered by plaintiff from the alleged assault." We perceive no error in this instruction. In actions for the recovery of damages for the wrongful expulsion of a passenger from a train, the passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected, and if treated with violence, or in an insulting manner, for the injuries to his person and feelings. If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded. "There is a special duty on the carrier to protect its passengers, not only against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of its own servants; and that for a breach of that duty he ought to be compelled to make the amplest reparation. The law wisely and justly holds him to a strict and rigorous accountability. We would not relax in the slightest degree this strict accountability. We know that upon it, in no small degree, depends the safety and comfort of passengers." Railway Co. v. Weaver, 16 Kan. 456; Railway Co. v. Kessler, 18 Kan. 523. We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights, or increase his damages. For any breach of contract or gross negligence on the part of the conductor, or the other employés of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be permitted to invite a wrong, and then complain of it. Hall v. Railroad Co., 15 Fed. 57; Townsend v. Railroad Co., 56 N. Y. 301; Bradshaw v. Railroad Co., 135 Mass. 409; Railroad Co. v. Connell, 112 Ill. 296; Car Co. v. Reed, 75 Ill. 125; 3 Wood, Ry. Law, § 364. Of course, a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life, or to prevent probable serious injury; nor can a party be lawfully ejected from a train while in motion, so that his being put off would subject him to great peril. In this case Rice made no unreasonable resistance. He did not resort to force or violence. Having a good ticket, and being entitled to ride, he refused to pay fare or get off the train. The conductor had no difficulty in leading him off, and about all that Rice did was merely to assert his lawful right to ride upon the train. Where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the jury are, and ought to be, allowed great latitude in assessing damages. They should award liberal damages in full compensation for the injuries received. The quiet and peaceable behavior of a passenger is to his advantage, rather than to his detriment.

Complaint is also made of other instructions of the court regarding the measure of damages. Among other things, the court said to the jury that if "the assault was malicious, and without cause or provocation, or was accompanied by acts of gross insult, outrage, or oppression, you may award the plaintiff exemplary or vindictive damages." Also, "that in estimating damages they might take into consideration the indignity, insult, and injury to plaintiff's feelings by being publicly expelled." Further, that, if they found "there was on the part of the conductor either malice, gross negligence, or oppression, they would not be confined in fixing damages to the actual damages received, but were justified in giving exemplary damages." It is said that these instructions were misleading and erroneous, because there was no evidence whatever to show that the conductor acted with malice or gross negligence. Upon the evidence of Rice, corroborated by McCulloch, another passenger, who said that he saw Rice purchase the ticket on October 29th, there was evidence before the jury upon which to found these instructions. Hufford v. Railroad Co. (Mich.) 31 N. W. 544. The forcible expulsion of Rice from the car where he was rightfully seated was such a wrong as is inevitably accompanied with more or less outrage and insult. There was no excuse for the act of expulsion, except the honest mistake or the gross negligence of the conductor. If that mistake was due to such reckless indifference to the rights of a passenger on the part of the conductor as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages. Railroad Co. v. Kessler, supra; Railroad Co. v. Rice, 10 Kan. 426. Whether the conductor was grossly negligent, amounting to wantonness, or actuated by malice, were matters before the jury, for their determination upon the evidence. Under the authority of Titus v. Corkins, 21 Kan. 722, Rice was entitled to recover the expenses incurred by him in the litigation, if entitled to exemplary damages. Hall v. Railroad Co., 15 Fed. 95–97. The amount of the verdict in this case was only $117.46; therefore the damages are not so excessive as to indicate passion or prejudice on the part of the jury. The other matters submitted are immaterial.

The judgment of the district court will be affirmed.

All the justices concurring.

HANSLEY v. JAMESVILLE & W. R. CO.

(23 S. E. 443, 117 N. C. 565.)

Supreme Court of North Carolina. Oct 22, 1895.

On petition for rehearing. Denied.

Chas. F. Warren and L. T. Beckwith, for petitioner. John H. Small, MacRae & Day, and W. B. Rodman, for defendant.

FURCHES, J. This is a petition to rehear this case, decided at September term, 1894, of this court, and published in 115 N. C. 602, 20 S. E. 528. The defendant is a corporation under the laws of this state running and operating its road between the towns of Washington and Jamesville, transporting both freight and passengers as a common carrier for pay. The plaintiff, a citizen of Washington, wanting to go to the town of Edenton and back, on the 7th of September, 1892, purchased a ticket of defendant to Jamesville, and from Jamesville back to Washington on the 9th. The defendant carried plaintiff to Jamesville on the 7th, and he went on to Edenton, and was in that town on the 8th of September. (It is not stated in this case that plaintiff went to Edenton, and was there on the 8th, but this was stated and agreed to by counsel on the argument.) On the 8th of September, soon after leaving Jamesville for Washington, the axle of defendant's engine broke, and when the plaintiff returned from Edenton to Jamesville on the 9th the defendant was unable to carry him on its road from Jamesville back to Washington, as it had contracted to do. Thereupon plaintiff brings this action for damages, which he lays at $500, and alleges that defendant's roadbed was in a bad, shackly, and ruinous condition; that defendant had but two engines, both of which were worn and in bad condition, one of them at that time being in the shops for repair, and not in a condition to be used; that the bad condition of defendant's roadbed had rattled the other one so as to cause the axle to break; that all this showed such willful negligence on the part of defendant towards the public and towards the plaintiff as to entitle him, not only to compensatory damages, but to exemplary damages. The defendant answered, denying the allegation of negligence, admits that the road was not in good condition, says it was poor and struggling for existence, and that it was expending the whole earnings of the road, and more, in trying to keep it in good repair, and was not able to do so. Therefore defendant denies that it is liable to plaintiff for anything, and certainly not for punitive damages. And, without reviewing the evidence, it is such as to warrant us in saying that the roadbed was in a bad, dilapidated, and ruinous condition; that defendant had but two engines, and they were old, worn, and in bad condition. That plaintiff is entitled to compensatory damages there can be no doubt, but as to whether he is entitled to exemplary damages is the question. It is said that railroads are quasi public servants; that they are created by the public (the legislature) and owe duties to the public in return for their right of franchise. And, while this is true, it can only be considered by us as a reason for establishing the law as we shall find it, and not as a reason for us to establish the law. Nor can we consider the question as to whether defendant's road is a poor corporation, struggling for existence, and expending all its earnings, and more, on its road; or whether it is a rich corporation. These are questions we have no right to consider in passing upon the question of law as to whether plaintiff is entitled to recover damages against defendant or not. Taylor v. Railroad Co., 48 N. H. 317.

The legal question involved in this case is conceded to be an important one, and is entitled to our best consideration. It is one that has been so much discussed by law writers and by the courts in judicial opinions, in which different phases or facts appear, that it is somewhat difficult to establish ourselves on what we consider solid ground. Often a very slight difference in the facts changes the reason upon which a case is decided. We find that decided cases, unless closely attended to, are often misleading. Also often a misunderstanding of some of the facts, or an inadvertence to some fact in the case, leads to error. This, we think, was the case with the learned justice who wrote the opinion we are now reviewing. In stating the facts in Purcell's Case, 108 N. C. 414, 12 S. E. 954, 956, he stated that when the defendant's train passed the depot it "was overloaded," when there was evidence tending to show that there was room for a number of other passengers; and this was the hypothesis upon which the court was asked to charge the jury, and which was refused by the court. This inadvertence, as we think, led the court to overrule Purcell's Case, supra. After as full investigation as we have been able to give to this case, we are of the opinion that the true ground for allowing exemplary damages is personal injury to plaintiff, caused by the negligence of defendant (and we do not undertake here to enumerate all the causes for exemplary damages where there is personal injury). And where there is no personal injury, there must be insult, indignity, contempt, or something of the kind, to which the law imputes bad motive towards a plaintiff; and when they are allowed they are in addition to compensatory damages. 1 Sedg. Dam. 520; 5 Am. & Eng. Enc. Law, p. 43, note, and cases cited. This principle we find is recognized and enforced in the following cases: A railroad conductor kissed a lady passenger on his train, and she was allowed to recover punitive damages, upon the ground that it was a personal indignity. 5 Am. & Eng. Enc. Law, p. 43. Where a railroad conductor refused to carry a passenger after he had paid his fare, the road is liable to exemplary damages. 3 Suth. Dam. §§ 935, 937. This is upon the same ground. Plaintiff is not entitled to exemplary damages unless there is a willful or intentional violation of plaintiff's personal rights. Railroad Co. v. Arms, 91 U. S. 489. Where a railroad carried a lady passenger a few hundred yards beyond the station, and upon application of the passenger refused to back the train to the station, but put the passenger out in a driving rain, with her infant child and baggage, the defendant was held to be liable to punitive damages. But this was put upon the ground of personal indignity and insult, as all the cases we have cited are; and the fact that the passenger could not use her umbrella, got wet, and was sick from the effects, was only allowed in evidence upon the measure of damages. But the gravamen of the action was the personal indignity with which the plaintiff had been treated by the defendant. Railroad Co. v. Sellers, 93 Ala. 13, 9 South. 375. We might cite many other cases to sustain the principle we have laid down, but do not deem it necessary.

We make no question, under our system of liberal pleading, that plaintiff may recover either in contract or tort, if he has made out his case. But he can no more recover in tort without making out his case than he could recover in contract without making out his case. The fact that the defendant's road was in bad condition was no insult or indignity to plaintiff, and as there was no personal injury on account of its bad condition, this affords him no cause of action. The fact that defendant's engine broke down on the 8th when plaintiff was in Edenton, was no personal insult, indignity, or intentional wrong to plaintiff. No doubt the defendant regretted the breaking down of the engine as much as plaintiff. The fact that plaintiff had a right of action for breach of the contract gives him no right of action for tort against the defendant. And unless he had the right to maintain an action of tort, he had no right to punitive damages. There can be no damages recovered when there is no right of action. Damages are not the cause of action, but the result of the action. Taking all the evidence in the case offered by the plaintiff, or that may be considered in his favor, we do not think it makes a cause of action against the defendant in tort, and that the defendant was entitled to have its second prayer for instruction submitted to the jury, to wit, "Taking the entire evidence in view, the plaintiff is not entitled to punitive damages." This was refused by the court, and we think there was error. We have arrived at our conclusion by a different treatment of the case, to some extent, from that adopted by the court in the opinion published in 115 N. C. 602, 20 S. E. 528; but our judgment is the same. And in this opinion we do not think it necessary to disturb the judgment as announced in Purcell's Case, supra. But the judgment in that case should be put upon the ground that the defendant treated the plaintiff, Purcell, with indignity and contempt in rushing by the station at faster speed, when there was room for other passengers, or at least when there was evidence tending to show this, and the court refused the prayer for instruction submitting this question to the jury. The petition is dismissed.

CLARK, J. (concurring in part). Concurring in the opinion in so far as it reinstates the authority of Purcell v. Railroad Co., 108 N. C. 414, 12 S. E. 954, 956, the vast and growing importance of the principles involved in this case to every one who shall travel over or ship freight by these great public agencies forbids my acquiescence in some of the reasoning relied on in the present case. In the recent case of Railroad Co. v. Prentice, 147 U. S. 106, 13 Sup. Ct. 261, Mr. Justice Gray commends the historical instruction of Chief Justice Pratt (afterwards Lord Camden) that: "A jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as a proof of the detestation of the jury of the action itself." And Mr. Justice Gray, for the court, adds: "The doctrine is well settled" that the jury, in addition to compensatory damages, "may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly * * * or with criminal indifference to civil obligations." In the present case his honor below charged the jury that: "If defendant failed to provide proper means for transportation of passengers,—as, for instance, the plaintiff in this case,—as they had undertaken to do, wantonly and willfully, the jury may give punitive or punishing damages; and the amount of such is largely a matter for the jury to determine, but the court will supervise, so as to see that no wrong is done." This sums up in a few words the whole controversy in this case, and it is this charge which "is this day brought into question." In Purcell's Case, supra, this court, in a unanimous opinion, laid down the wholesome, and it would seem the necessary, principle that for the willful and wanton violation by a railroad corporation of the regulations prescribed for its control and conduct by the lawmaking power (Code, § 1963) such corporation is liable to punitory damages. These words, "willful and wanton," have a well-defined meaning in our courts, and have been construed in State v. Brigman, 94 N. C. 888, and State v. Morgan, 98 N. C. 641, 3 S. E. 927, to mean "purposely, intentionally, and with reckless disregard of the rights of others." Our courts have upheld the authority to grant punitory damages in all proper cases, and if they could ever be granted against a corporation in any case it would seem certainly they should lie whenever the conduct of its officials has shown a "willful, intentional, violation" of the statutes enacted by the legislature for the control of these corporations, and a "reckless disregard of the rights of the traveling public" or shippers of freight. The sovereignty which, through its agents, created and gave existence to this corporation, has recognized this rule as wholesome and just, for in the act creating the railroad commission (Act 1891, c. 320, § 11) it is provided in almost identically the same words (indeed, leaving out the word "wantonly") that for a "willful violation of the rules and regulations made by the commissioners railroad companies are liable for exemplary damages." It would be the strangest of anomalies if a railroad corporation is liable to exemplary damages for the willful violation of the regulations of the railroad commission, but is not thus liable for the willful and wanton violation of the regulations prescribed by the legislative power which created them both. And we should have this further anomaly in the law: A telegraphic dispatch announcing the critical illness of a near relative is sent. If not delivered promptly, the sendee, as is properly held by numerous decisions of this court, is entitled to exemplary damages, though he has suffered no personal injury, nor has any indignity been inflicted upon him. Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044; Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427; Sherrill v. Telegraph Co., 116 N. C. 655, 21 S. E. 429. The reason is that, being put upon notice by the tenor of the dispatch, it is a wanton and willful violation of the duties for which it was incorporated for the company to fail to deliver the message promptly, and the highest reasons of public policy require that exemplary damages should be imposed. Now, suppose the dispatch is delivered, and the sendee starts for his home, but the railroad corporation, finding that it can send a larger number of passengers to another point, stops its car,—as in the present case they stopped it, because it was cheaper to send a broken piece of machinery to Norfolk to repair than to keep necessary repair shops or another engine,—and by this willful and wanton violation of its statutory duties to furnish sufficient transportation the recipient of the telegram does not reach the bedside of his dying wife, would it not be an anomaly that for a willful and wanton violation of its duty to deliver the telegram promptly the telegraph company is liable to exemplary damages, but for an equally willful and wanton violation by the railroad corporation to transport the passenger according to schedule that company is only liable to pay the passenger's board bill during his detention. In a case where the corporation failed to bring the passenger home on his round-trip ticket, as the defendant in this case failed to do, punitive damages were sustained in Head v. Railroad Co., 79 Ga. 358, 7 S. E. 217.

But it was contended on the argument that though the railroad corporation is liable for the willful and wanton violation of its statutory duty in running its trains by a station without stopping, and thus failing to take on a passenger when there happens to be a vacant seat, it is not so liable if with full notice of more passengers waiting at a station than the cars can carry, and in time to add more cars, it fails to do so. It is difficult to recognize the authority to hold that this act of willful violation of its statutory duties and wanton disregard of the rights of the public does not subject the corporation to punitive damages, while the same willfulness and wantonness in running by a station without stopping does so subject the corporation if there happens to be a vacant seat. It is the same willfulness and wantonness to fail to have sufficient seats when the corporation has notice in time and cars in its control as not to stop to fill the empty seat. The statute authorizes no such discrimination. It provides (Code, § 1963): "Every railroad corporation * * * shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of stopping and at the usual stopping places established for receiving and discharging passengers and freight for that train, * * * and shall be liable to the party aggrieved in damages for any neglect or refusal." The statute nowhere intimates any distinction whereby one willful and wanton violation of the statute is cause for exemplary damages, and that another equally willful and wanton violation of the same statute incurs no such liability. The reasonable and impartial rule laid down by a unanimous court in Purcell's Case is that, if the breach of the statute "was mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves, which rendered it unsafe to take a greater number aboard, and the company could not by reasonable diligence have increased the number of cars, then the plaintiff could only recover compensatory damages. If, however, * * * the defendant, by reasonable diligence, could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but, regardless of its duties and of the rights of those whom it had invited to present themselves at its regular station for passage, or if, having room for additional persons, it passed without stopping, this displayed a gross and willful disregard of the rights of the plaintiff, which entitled him to recover punitive damages." This is sustained by numerous authorities in other states. Heirn v. McCaughan, 32 Miss. 1; Railroad Co. v. Hurst, 36 Miss. 660; Silver v. Kent, 60 Miss. 124; Wilson v. Railroad Co., 63

Miss. 352; Railroad Co. v. Sellers, 93 Ala. 9, 9 South. 375; 3 Suth. Dam. § 937. It was urged on the argument that it would be difficult often to decide what state of facts would or would not constitute a willful and wanton disregard of statutory duties. But that does not authorize a judicial repeal of the statute, either in whole or in part. It must, in each case, be determined whether the facts proved show a "willful and wanton disregard of statutory regulations," and, if they do, the jury is empowered to impose exemplary damages, subject to the protective supervision of the court to prevent abuse by setting aside the verdict.

But it was further argued before us that, while a railroad corporation is by statute liable for "a willful violation" of the regulations of the railroad commission, it is not liable for "a willful and wanton violation of statutory regulations"; and hence, when a train with several vacant seats passes its regular station without taking on a passenger waiting there, the liability is only because of the indignity offered the intending passenger. But it will be noted that this is a mere substitution of words. The sole indignity offered him is the willful and wanton disregard of his rights as guarantied by the statute (Code, § 1963), that "sufficient accommodation for transportation shall be afforded at the usual stopping places"; and the same indignity is equally offered him by the violation of the same statute if the company knows in reasonable time that the number of cars are insufficient, and can supply them, and fails to do so, running by without stopping, though with crowded cars, because it chose not to supply enough. The duty to furnish sufficient cars is clearly stated in Branch v. Railroad Co., 77 N. C. 347, independently of the express requirement of the statute (Code, § 1963) above quoted. In the present case the learned judge charged the jury, in accordance with the ruling of this court, that, if the defendant was guilty of willful and gross negligence, the plaintiff could recover, otherwise not; and further, that if the accident occurred, which they could not have, in the ordinary course of their business, foreseen and provided for, this would not be willful negligence, but, "if the character of the negligence was such as to satisfy the jury that the defendant did not care or was indifferent as to whether they had the train there (to bring the passengers home), it would be willful negligence." It was in evidence that when the plaintiff, who held a return ticket, applied for transportation, the official in charge gave himself no concern whatever, made no effort to have the plaintiff brought home, and refused the use of the hand car. His honor, after stating correctly and more fully what facts would constitute willful negligence and what would not, instructed the jury that only in the event they found willful negligence could the plaintiff recover. There was ample evidence to submit to the jury the inquiry whether or not there was willful negligence. Both authority and reason sustain the proposition that "the liability of a railroad company for exemplary damages cannot be made to depend on the ability of the corporation to earn enough money to keep its road in such condition as to be operated with safety." Railroad Co. v. Johnson, 75 Tex. 158, 162, 12 S. W. 482; Taylor v. Railroad Co., 48 N. H. 304, 317. If the company is unwilling or unable to furnish money to run its trains according to the statutory requirement, it should cease to hold itself out to the public as a common carrier.

The jury having found that there was a willful violation by the defendant of its statutory duty to transport the plaintiff, and a wanton disregard of the plaintiff's rights in that respect, it is not the province of this appellate court to review the facts and disturb the verdict.

The principle involved is one of universal interest. It is nothing less, when reduced to its last analysis, than whether these corporations, primarily created for the convenience and advantage of the public, with the incidental benefit of profit to their owners, are subject to exemplary damages when they willfully and wantonly violate the statutes passed for their regulation by the power which created them. If they are not, then clearly and unmistakably the public are in the power and at the mercy of the arbitrary will of corporations, which, daily aggregating into larger and larger masses, are powerful beyond any control other than the law. And if they possess the power of violating willfully and wantonly the statutory regulations prescribed for the protection of the public, without fear of punishment by the imposition of exemplary damages at the hands of a jury, then the lawmaking power, in creating them, is, like the magician in the Eastern story, evoking a spirit which mastered and destroyed him. The rights of the people are too much at stake in maintaining the principle that railroad corporations are liable to exemplary damages for the "willful violation" of statutes passed for their regulation, equally with similar violations of the regulations of the railroad commission, for any denial or limitation of such principles to pass unnoticed.

STACY v. PORTLAND PUB. CO.[1]

(68 Me. 279.)

Supreme Judicial Court of Maine. June 7, 1898.

Case for libel. Defendant published in its paper, under the head of "Personal," the following: "A responsible gentleman of Hallowell informs us that Secretary of State Stacy was recently arrested in that city for drunkenness and disturbance. A ten-dollar note quieted the affair." The plea was the general issue and justification. On the trial, plaintiff requested an instruction that, if the jury found that the article was published with express malice, they might give exemplary damages. This the presiding judge refused. The verdict was for plaintiff; damages, one dollar. Plaintiff alleges exceptions, and moves to set aside verdict for inadequacy.

O. D. Baker, for plaintiff. T. B. Reed, for defendants.

PETERS, J. * * * * *

The plaintiff's counsel earnestly insists that it was error on the part of the court to omit (after request) to direct the jury that punitive damages might be recovered in such a case as this. Taking the case as it resulted, we are satisfied that the plaintiff has sustained no injury in this respect. Without overruling former decisions, this court cannot deny that punitive damages may be recovered against a corporation for the malicious conduct of its servants and agents, by a person injured by it. To the facts and findings, however, presented in the case at bar, our judgment is that the doctrine contended for has no reasonable application. The charge against the plaintiff was of a serious nature, calculated to wound his sensibilities, and to degrade him in his personal character. A substantial, but not a full and complete, justification of the charge, was pleaded by the defendants. The plaintiff was allowed to recover damages for the injury "to his character as a man, a citizen; for mental pain and suffering, anguish, mortification; and for loss of the benefits of public confidence and social intercourse,"—resulting from the publication. The jury were permitted to add, as actual damages, for any aggravation of these elements of injury occasioned by the express malice of the person who published the article complained of. The jury assessed nominal damages only, the verdict being for one dollar. The legal signification of the verdict is, either that there was no actual and express malice entertained towards the plaintiff by the defendants' agent, or that, if there was, it did the plaintiff no injury. There is no room for punitive damages here. There is no foundation for them to attach to or rest upon. It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But, if all the individual injury is merely technical and theoretical, what is the punishment to be inflicted for? If a plaintiff, upon all such elements of injury as were open to him, is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others beside himself? If there was enough in the defense to mitigate the damages to the individual, so did it mitigate the damages to the public as well. Punitive damages are the last to be assessed, in the elements of injury to be considered by a jury, and should be the first to be rejected by facts in mitigation. We think the irresistible inference is that, if the instruction had been given as it was requested, the verdict would not have been increased thereby to the extent of a cent. There may be cases, no doubt, where the actual damages would be but small, and the punitive damages large; but this case is not of such a kind. It would have been proper in this case for the presiding justice to have informed the jury that if the actual damages were nominal, and no more, they need not award punitive damages. Any error in the ruling was cured by the verdict. Gilmore v. Mathews, 67 Me. 517.

Some other points appear to have been raised at the trial, which are not discussed in the very full and able brief of the plaintiff's counsel, and we may very well regard them as now waived. A motion is made against the verdict as too small. The court rarely interferes with a verdict in a case of this kind, whether moved against as too large or too small. We do not allow the motion. Motion and exceptions overruled.

APPLETON, C. J., and WALTON, BARROWS, VIRGIN, and LIBBEY, JJ., concurred.

NOTE. To the same effect, see Kuhn v. Railway Co., 74 Iowa, 137, 37 N. W. 116; and Schippel v. Norton, 38 Kan. 567, 16 Pac. 804. Contra, see Wilson v. Vaughn, 23 Fed. 229, and Railroad Co. v. Sellers, 93 Ala. 9, 9 South. 377, where the court says: "(6) There are respectable authorities which appear to hold that exemplary damages cannot be awarded when the actual injury is purely nominal, the theory being that as exemplary damages are laid in conservation of the interests of society, which for this purpose are considered 'as blended with the interests of the individual,' where the individual is injured only nominally or not at all in fact, though his rights are violated, 'the interests of society have virtually nothing to blend with,' and hence, 'the individual having but a nominal interest, society can have none,' etc. Stacy v. Publishing Co., 68 Me. 287. This view is specious, but, we apprehend, not sound. The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter from its repetition. The position of the supreme court of Maine can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money. Many acts denounced as crime by our statutes, or by the common law, involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages as compensation beyond a merely nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by the imposition of 'smart money'; and, on the same principle, acts readily conceivable which involve malice, willfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crime, and inflicting no pecuniary loss or detriment, measurable by a money standard, on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages. And upon these considerations the law is, and has long been, settled in this state that the infliction of actual damage is not an essential predicate to the imposition of exemplary damages. Parker v. Mise, 27 Ala. 480; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419; Railroad Co. v. Heddleston, 82 Ala. 218, 3 South. 53. See, also, 1 Suth. Dam. 748. The charges requested by the defendant to the effect that actual damage must be shown before punitive damages could be recovered were therefore properly refused."

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[1] Portion of opinion omitted.

STEVENSON v. SMITH et al.

(28 Cal. 103.)

Supreme Court of California. April, 1865.

Appeal from district court, Second judicial district, Tehama county.

The facts are stated in the opinion of the court.

George Cadwalader, for appellant. W. S. Long, for respondents.

SAWYER, J. This is an action to recover a mare and colt seized by the defendant (sheriff of Tehama county) under an attachment, and damages for their detention. Plaintiff recovered the property. Plaintiff moved for a new trial on the ground that certain special damages, claimed to have been proved, were not found for him. The motion was denied, and the plaintiff appeals from the order denying a new trial.

The appellant claims that the evidence shows that the animals were placed by defendants in fields where the pasturage was poor, and that in consequence of this act they lost flesh and depreciated in value to the extent of five hundred dollars. Also that the mare was a valuable brood mare, taken to Tehama county for the purpose of being bred to a particular horse, and that by reason of the taking and detention by defendants the breeding season was lost, whereby a further damage was shown to have been sustained to the amount of five hundred dollars, and that the court should upon the evidence have found these items of damage for plaintiff.

On examination of the pleadings, we find no averments in the complaint that would authorize the recovery of the items claimed. These damages are special, and the facts out of which they arise must be averred, or they cannot be recovered.

Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself,—as when some particular damage arises from the uttering of slanderous words actionable in themselves,—or are such as arise from an act indifferent, and not actionable in itself, but only injurious in its consequences," etc. 1 Chit. Pl. 395.

Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts, etc. * * * But when the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. * * * And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So in trespass 'for taking a horse,' nothing can be given in evidence which is not expressed in the declaration, and if money was paid over in order to regain possession, such payment should be alleged as special damages." Id. 396.

The complaint in this case only alleges the ownership of the animals, the value, the wrongful taking and detention, the demand, and that plaintiff "has sustained damages by reason of such wrongful taking and detention of said chattels and property in the sum of one thousand dollars."

From these facts alone the law does not imply either of the items of damages claimed to have been proved. The first item is not even consequential upon any of the facts alleged, but results from other acts of defendants while the animals were in his possession. And the second item of damages would not necessarily result from a mere taking and detention. These damages depend upon an extraordinary value of the animal for a particular purpose, and upon the special use to which she was capable of being applied. The facts out of which these items of special damages arise must be alleged in the complaint, or they cannot be recovered. They are not alleged, and are, therefore, not embraced within the issues to be tried. For this reason, if for no other, the plaintiff is not entitled to judgment for such items of damages. There was, then, no error in not finding for plaintiff on these points.

The only other point made by appellant is, that the court erred in not giving plaintiff costs. There is no doubt in our minds that the plaintiff was entitled to costs. But this error in no way affects the finding, and is not a ground for new trial. The error cannot, therefore, be corrected on appeal from an order denying a new trial. The proper mode of reviewing and correcting this error is on appeal from the judgment, but no such appeal has been taken in this case.

Judgment affirmed.

WABASH WESTERN RY. CO. v. FRIEDMAN.

(30 N. E. 353, 34 N. E. 1111, and 146 Ill. 583.)

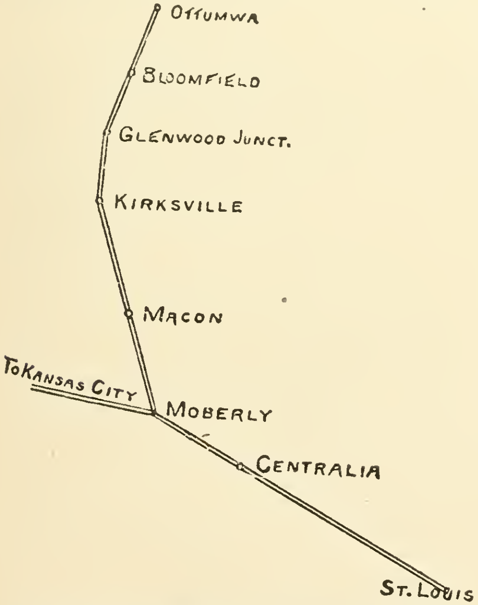
Supreme Court of Illinois. March 24, 1892.

Appeal from appellate court, First district.

Action by Oscar J. Friedman against the Wabash Western Railway Company to recover damages for personal injuries. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

George B. Burnett (Black & Fitzgerald, of counsel), for appellant. Page, Eliel & Rosenthal (J. W. Duncan, of counsel), for appellee.

CRAIG, J. This was an action brought by Oscar J. Friedman against the Wabash Western Railway Company to recover damages for a personal injury received on the 1st day of May, 1888, while plaintiff was a passenger on the defendant's line of road, running from Moberly, Mo., to Ottumwa, Iowa. The following map shows the line of defendant's road. The accident which resulted in the injury complained of occurred in the state of Missouri, between Kirksville and Glenwood Junction, two stations indicated on the map.



Distance from Centralia to Moberly, 24 miles.
Distance from Moberly to Ottumwa, 131 miles.
Distance from Kirksville to Glenwood Junction 25 miles.

The declaration contained five counts, but they are all substantially alike. In the second count, it is averred that defendant was on May 1, 1888, operating a railroad from Kirksville, Mo., to Glenwood Junction, Mo., and operating trains for the conveyance of passengers for reward; "and the said plaintiff, at said Kirksville, then became and was a passenger in a certain train of the said defendant on the said railroad, to be carried, and was accordingly then being carried, in the said train, from Kirksville to said Glenwood Junction," for reward, etc.; that it became and was the duty of the said defendant to properly and safely construct and maintain the track and road-bed of said railway, but the defendant so negligently constructed and maintained the same that the same were not then safe for the use of passengers on defendant's trains, "and the rails of said track of said railroad were then and there in bad repair and condition, and a certain rail in the said track had become broken by reason of the said negligence of the said defendant, and thereby a certain car then being in the said train, and of a sort commonly called 'sleeping-cars,' was then and there thrown with great force and violence from and off the said track;" and plaintiff, being then and there asleep and in the exercise of due care, was thrown from the berth in said car, in which he was sleeping, with great force and violence, across the car, and into the opposite berth, "by means whereof, then and there, the spine and spinal column, including the spinal cord, of the said plaintiff, became and were greatly bruised, hurt, and injured, and the said plaintiff suffered and incurred an injury of the kind known as 'concussion of the spine,'" whereby he incurred expenditures, in endeavoring to be healed, amounting to $5,000, and became sick, lame, etc., "from thence hitherto," suffering great pain and being prevented from attending to his business, and thereby losing profits, etc. In the conclusion of the declaration the plaintiff claimed damages amounting to $50,000. The defendant pleaded the general issue, and on a trial before a jury the plaintiff recovered $30,000, and the judgment, on appeal to the appellate court, was affirmed.

It will be observed that in each count of the declaration the plaintiff, in stating where the relation of passenger and common carrier commenced, and where such relation existed between the plaintiff and the defendant, averred as follows: "And the said plaintiff, at said Kirksville, then became and was a passenger on a certain train of the said defendant on the said railroad, to be carried, and was accordingly then being carried, in the said train, from Kirksville to said Glenwood Junction," for reward, etc. No evidence was introduced on the trial that the plaintiff became a passenger at Kirksville for Glenwood Junction; but the plaintiff testified that he took the sleeper at Moberly to go to Ottumwa, and that he had a ticket which read, from Moberly to Ottumwa, which he had purchased at Moberly in the fall of 1867. The testimony offered for the purpose of proving the averment of the declaration was objected to on the ground of a variance between the evidence and the declaration; but the court overruled the objection, and allowed the evidence to be introduced. Upon the question of variance the defendant asked the court to instruct the jury as follows:

"The averment in plaintiff's declaration that he became a passenger in the train of defendant at Kirksville, Mo., to be carried from said Kirksville to Glenwood Junction, is material, and must be proved as alleged; and if the jury believe from the evidence that said plaintiff did not at the time in question become a passenger in said train of defendant at said Kirksville, to be carried to said Glenwood Junction, then the jury will find for defendant, regardless of all other questions in the case." But the court refused to give the instruction as prayed, but qualified it by adding as follows, to-wit: "But if it appear from the evidence that plaintiff was a passenger on the train of the defendant between the points mentioned, traveling from a point south of said Kirksville to a point beyond Glenwood Junction, then the averment in the plaintiff's declaration is sufficiently made out." It may be said that the question involved is a technical one, and hence not entitled to that consideration which a court should give to a question which goes to the merits of an action. The plaintiff had the right, when the question was raised, to amend his declaration, and thus obviate the difficulty; but he saw proper to take another course, and he occupies no position now to complain. should the rules of law that control in such cases be strictly enforced against him. But, while the question involved may be regarded somewhat technical, still it will be remembered that the plaintiff is seeking to recover a large sum of money, and the defendant has the right to demand and insist that the grounds upon which the plaintiff claims a right of recovery should be clearly and concisely stated, and that the case made on the declaration should be proven as laid. If a plaintiff may allege in his declaration one ground of recovery, and on the trial prove another, a defendant never could be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a defense; but if one ground of action may be alleged, and another proven, a declaration would be a delusion, and, instead of affording a defendant notice of what he was called upon to meet, it would be a deception. Here the plaintiff claimed that the relation of passenger and common carrier existed between him and the defendant, and that the defendant owed him a duty growing out of that relation. In speaking of a declaration in such a case, Chitty on Pleading says: "When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of such duty, which we have seen may be founded either upon a contract between the parties or on the obligation of law arising out of the defendant's particular character or situation, and the defendant must prove such duty as laid; and a variance will, as in actions on contract, be fatal." Chit. Pl. 382. The same author also says: "In an action on the case founded on an express or implied contract, as against an attorney, agent, carrier, innkeeper, or other bailee, for negligence, etc., the declaration must correctly state the contract or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of a contract, though in an action ex delicto, may be fatal, as in an action ex contractu. The declaration in such case usually begins with a statement of the particular profession or situation of the defendant and his retainer, and consequent duty or liability. The declaration will be defective if it does not show that by express contract or by implication of law, in respect to the defendant's particular character or situation, etc., stated by the plaintiff, the defendant was bound to do or omit the act in reference to which he is charged." Chit. Pl. p. 384.

It may, however, be said that the statement in the declaration of the point from which and to which the plaintiff was being carried was mere inducement, and need not be proved as laid. Upon a question of this character, Chitty on Pleading (page 292) says: "In general, however, every allegation in an inducement which is material, and not impertinent and foreign to the cause, and which, consequently, cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and consequently great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation." If, therefore, the allegation is to be regarded as inducement, it was necessary to prove it as alleged. And at page 385 the author further says: "It is also a rule that if a necessary inducement of the plaintiff's right, etc., even in actions for torts, relate to and describe and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract; it being matter of description. Thus, even in case against a carrier, if the termini of the journey which was to be undertaken be misstated, the variance will be fatal Here the allegation in the inducement relates to matter of description." Harris v. Rayner, 8 Pick. 541, is a case in point. The action was brought to recover for an injury sustained by the oversetting of a stage-coach. The plaintiff alleged in his declaration that he paid defendants, for his passage in their stage from Albany to Boston, $10, the usual fee for said passage, and defendants, in consideration thereof, undertook and promised carefully to transport plaintiff in said passage from Albany to Boston. In support of the declaration, plaintiff proved that he was in a stage-coach from Worcester to Boston, and that just as he arrived at Boston the coach was overset by the carelessness of the driver, and he was thereby injured. It was held that the evidence did not prove the contract set out in the declaration, and in passing upon this point the court said: "We think there was no sufficient proof at the trial of the contract as alleged in the declaration. The declaration alleges a contract on the part of the defendants to transport the plaintiff from Albany to Boston. The proof was that the plaintiff rode in defendants' stage from Worcester to Boston; and, although this is part of the route from Albany to Boston, yet it is part, also, of many other lines of travel. So that the contract as alleged remains without proof." In Tucker v. Cracklin, 2 Starkie, 385, and in Railroad & Banking Co. v. Tucker, 79 Ga. 128, 4 S. E. 5, actions were brought against carriers for the loss of goods; and in each case it was held that a variance between the proof and allegation as to the termini of the carriage was fatal. In Phillips, Ev. (volume 3, p. 268,) the author says: "The plaintiff will be nonsuited if the termini of the journey are not correctly set forth." In Railroad Co. v. Sutton, 53 Ill. 398, the point was made that an averment in the declaration of defendant's undertaking to convey the plaintiff from West Urbana to Tolono is not sustained by proof of an undertaking to convey from Champaign City to Tolono. In disposing of the question of variance, it is said: "It would appear from the testimony that West Urbana and Champaign City are one and the same place; consequently, there was no variance." The averment in plaintiff's declaration that he became and was a passenger at Kirksville, to be carried to Glenwood Junction, for reward, was, in effect, a statement that he took the defendant's train at Kirksville for Glenwood Junction, and that he had paid or was ready to pay his fare from one point to the other when called upon, whereupon there was an implied contract on the part of the railway company to safely carry him from one point to the other. We think it plain that the averment in plaintiff's declaration was not sustained by proof that he became a passenger at Moberly for Ottumwa. It may be true that plaintiff stated more in his declaration than he might have stated; that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road. But, having gone into detail in his allegation, the law requires him to prove them as laid. What is said in Bell v. Senneff, 83 Ill. 125, is in point here: "As a general rule a party is required to prove the averments of his pleadings as he makes them. He may aver more than is required; but, as a general rule, he must prove them, although unnecessarily made." In Derragon v. Rutland, 58 Vt. 128, 3 Atl. 332, it was held that every averment which the pleadings make material as a descriptive part of the cause of action must be proved as alleged; and any variance which destroys the legal identity of the matter or thing averred with the matter or thing proved is fatal. In State v. Copp, 15 N. H. 212, it is said: "It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can be rejected." See, also, 1 Phillips, Ev. pp. 709, 710; Steph. Pl. p. 124, appendix. Here the plaintiff was bound to allege that he was a passenger on defendant's train of cars for reward. This was material, and the further averment that he became a passenger at Kirksville for Glenwood Junction was descriptive of the identity of that which was legally essential. It could not be rejected or disregarded. In conclusion, we think it plain, under the authorities, that there was a variance between the proof and the declaration; and the court erred in the admission of the evidence, and in the modification of defendant's instruction.

On the trial the plaintiff was permitted, against the objection of the defendant, to introduce evidence tending to prove that the plaintiff at the time of the injury was receiving a compensation for his services as a traveling salesman of $3,000 per annum. The declaration contained no allegation of any special contract or engagement of the plaintiff with any person under which he might earn money for his services. In Railway Co. v. Klauber, 9 Ill. App. 613, in discussing a question of this character it is said: "Neither of these allegations points to any damages growing out of or depending upon the peculiar circumstances or business of the defendant. In Tomlinson v. Derby, 43 Conn. 562, the plaintiff was injured by means of a defective highway, and his allegation was that he was thereby 'prevented from transacting his ordinary business;' and it was held that, under such allegation, he could not show that he was earning $100 a month in carting and sawing timber. So, in Taylor v. Munroe, 43 Conn. 36, under a similar allegation, it was held that the plaintiff could not show that she was a buttonmaker, and what wages she earned in that business. In City of Chicago v. O'Brennan, 65 Ill. 160, the plaintiff brought suit for an injury caused by the falling of a portion of the brick and plastering in the common council chamber in the city. The allegation in the declaration was that 'the plaintiff, who was pursuing his occupation as journalist,' was injured, etc., 'and thereby the plaintiff, as lawyer, lecturer, and journalist, became and was sick, sore, and incapacitated from attending to his business, and so continued for a long time, to-wit, for two months; and, as regards plaintiff's profession as a lecturer, he has been almost wholly, ever since, disabled from pursuing it.' It was held that under these allegations the plaintiff could not give in evidence the fact of a particular engagement to lecture in Virginia, and the probable gains thereof. The court say: 'In order to subserve the ends of good pleading, which are to apprise the opposite party of the nature of the claim, and prevent surprise, it was necessary that these special damages, and the facts on which they were based, should have been set out in the declaration.' " Baldwin v. Railroad Corp. 4 Gray, 333. City of Bloomington v. Chamberlain, 104 Ill. 272, is also a case in point. There the admitted evidence was held not to be erroneous, but the ruling was placed on the express ground that the evidence was not as to the loss of profits of a particular engagement. Had the evidence gone to that extent, as is the case here, it is plainly laid down that the evidence would have been erroneous, as held in City of Chicago v. O'Brennan, 65 Ill. 160. This is apparent from what is said in the opinion of the court on page 274. We think the rule established in the cases cited is the correct one, and the court erred in the admission of the evidence. It cannot be said that the error was a harmless one, as the evidence was of a character calculated to produce on the minds of the jury an impression that the plaintiff, on account of his capacity to earn a large salary before the injury, which he had lost by the accident, and hence should recover large damages.

It may, however, be said that the error was cured by an instruction given by the court as follows: "The court permitted the testimony of what plaintiff was earning at the time of the injury charged. This testimony was admitted for no other purpose than to show plaintiff's capacity to earn money. and must not be considered in any respect as a measure of damages." It is not entirely clear what the instruction means. While the court directed the jury that the evidence was not to be considered as a measure of damage the court failed to point out what use they should make of the evidence. The court ruled, when the evidence was offered, that it was competent for the consideration of the jury. That ruling was never changed. The evidence was allowed to remain with the jury for their consideration, and it could have no other effect than to swell the damages. Had the court, when it was ascertained that an error had been committed in admitting it, excluded the evidence entirely from the consideration of the jury, the error would in a great measure have been removed; but that course was not pursued. The instruction did not, in our judgment, cure the error. For the errors indicated the judgment of the appellate and circuit courts will be reversed, and the cause remanded.

(Oct. 23, 1893.)

MAGRUDER, J., (dissenting.) It seems to me that the petition for rehearing in this case has demonstrated beyond question the right of the appellee to a rehearing. First, the declaration is sufficient as a declaration upon the common-law liability of the carrier; second, the declaration alleges that the plaintiff "was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains, profits, and compensations, which he might and otherwise would have made and acquired." This was a sufficient allegation of special damage to justify the admission of evidence that plaintiff at the time of the injury was receiving a compensation for his services as a traveling salesman of $3,000 per annum, under the decision made in City of Bloomington v. Chamberlain, 104 Ill. 268. In the latter case the allegation in the first count of the declaration was that "plaintiff was hindered from transacting her business and affairs and deprived of large gains and profits, which she otherwise would have earned," and, in the second count, "that she had been rendered unable to earn or make for herself a living, and had been deprived of large gains and profits which she otherwise would have earned." Under these allegations the plaintiff was there permitted to testify that she had taught school at $50 per month. If the law is a science of precedents, no instance can be found where a precedent so exactly fits a subsequent state of facts as the Chamberlain Case fits the facts disclosed by the record in the case at bar upon the second point here designated.

BAILEY, C. J., and BAKER, J., concur.

HEISTER v. LOOMIS.

(10 N. W. 60, 47 Mich. 16.)

Supreme Court of Michigan. Oct. 12, 1881.

Error to circuit court, Eaton county.

Crane & Dodge and Michael Kenny, for plaintiff in error. Henry A. Shaw, for defendant in error.

COOLEY, J. Loomis sued Heister in trespass for an assault and battery. The evidence tended to show that on the 3d day of August, 1877, Heister, with some other persons, suddenly came upon the plaintiff, and with words such as, "I have got you where I want you now," "We'll give you what you deserve," proceeded to strike and kick him until he was seriously injured. On the cross-examination of the plaintiff, defendant sought to show that, on the previous Sunday evening, in passing his house, the plaintiff had stopped in front of it, and used vile and abusive language to his wife. Repeated questions put for this purpose were objected to by the plaintiff, and ruled out. This ruling was correct. The language attributed to the plaintiff was exceedingly provoking, and, if a battery had followed immediately, a jury might possibly have excused it, or dealt with it leniently. But the law does not and cannot, consistently with the safety of society, admit the provocation of words as an excuse for blows given after the blood has had time and opportunity to cool. To do so would be to encourage parties injured, or thinking themselves injured, by the misconduct of others, to take into their own hands the punishment of the offender; and violence would beget violence, as each party measured out according to the vehemence of his passion the punishment which he thought or imagined his enemy deserved. The safer view for society and the violated law is to consider the fact that a battery has been committed in revenge for a previous wrong as an aggravation of the fault, instead of an excuse for it.

The most important question in the case is whether the court correctly admitted certain evidence of special damages. The declaration averred that the plaintiff, because of the wounds, bruises, and injuries inflicted upon him by the defendant, "was greatly hindered and prevented from doing and performing his work and business, and looking after and attending his necessary affairs and avocations, for a long space of time," etc. The plaintiff testified that his business was that of a farmer; and, under objection, he was permitted to state that his farm was a grass farm; that, when assaulted, he was about half through cutting his hay; that he was bothered some about help; and that the cutting was delayed because of his injury; and that his crop of hay was damaged in consequence at least $50. The defendant contends that this evidence of injury to his hay was inadmissible, because the declaration contained no special averments which would fairly apprise the defendant of the purpose to offer it.

We have been very liberal in this state in receiving evidence of special injuries when the declaration averred them; much more so than the courts of some other states. The cases of Chandler v. Allison, 10 Mich. 460, Allison v. Chandler, 11 Mich. 542, Gilbert v. Kennedy, 22 Mich. 117, and Welch v. Ware, 32 Mich. 77, will sufficiently attest the fact. The difference in the rules applicable in cases of contract and tort has also been carefully marked and emphasized. Where only a breach of contract is involved, the defendant is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time the contract was entered into. The damage allowed in such cases must be something which could have been foreseen and reasonably expected, and to which the defendant can be deemed to have assented, expressly or impliedly, by entering into the contract. Borille, C. J., in Sawmill Co. v. Nettleship, L. R. 3 C. P. 499; Hadley v. Baxendale, 9 Exch. 344; Hopkins v. Sanford, 38 Mich. 611. But in cases of tort the plaintiff does not assist in making the case; it is made for him against his will by a party who chooses his own time, place, and manner of committing the wrong; and if the nature of the case which he thus makes up is such that the elements of injury are uncertain, and there is difficulty in arriving at the just measure of redress, the consequences should fall upon the wrongdoer. "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be certainly measured, would be to enable parties to profit by and speculate upon their own wrongs, encourage violence, and invite depredation." Gilbert v. Kennedy, 22 Mich. 117, 130.

But where the damages are such as do not follow the injury, as a necessary consequence, they should be specially alleged in the declaration. This is a rule of fairness, that the defendant may know what case it is intended to make against him, and be prepared to meet it, if it is false or falsely colored. In the cases above cited from our own Reports, the allegations of special damage were very full and specific. But in this case there is only a general allegation that the plaintiff was prevented from doing and performing his necessary business, and looking after and attending his necessary affairs and avocations. This liability may well be said to flow as a necessary consequence from any severe injury; and it was therefore held in Tomlinson v. Town of Derby, 43 Conn. 562, that such an averment could only be construed as characterizing the injury and indicating its extent in a general way, and that it did not lay the foundation for proof of special damages in a particular employment. Evidence that plaintiff was engaged in a particular business, at which he was earning $100 a month, was therefore excluded in that case, though the declaration was similar to the one here. Taylor v. Town of Monroe, 43 Conn. 36, is to the same effect. Wade v. Leroy, 20 How. 34, must be regarded as opposed to these.

In Baldwin v. Railroad Corp., 4 Gray, 333, similar evidence was held inadmissible, under the general allegation of injury. The action was for a physical injury, and the plaintiff had been permitted to show that she was by occupation a school teacher, and possessed the necessary education and learning. The court said the evidence "could have had no relevancy or application to the questions at issue between the parties except as forming the basis on which special damages were to be assessed for the injury of which she complained. It did not tend to show an injury falling within the class of general damages. That class includes only such damages as any other person as well as the plaintiff, under the same circumstances, might have sustained from the facts set out in the declaration. Without determining the more difficult question whether the evidence would be admissible under any form of declaration, it is clear that this part of the plaintiff's claim could be founded only upon a peculiar loss sustained by her by reason of the interruption to her occupation, resulting from the tortious act of the defendant. They were therefore, in their nature, damages not necessarily flowing from the acts set out in the declaration, and of which the defendants could not be supposed to have notice unless they were properly averred." Evidence of this nature was received in Railroad Co. v. Coyle, 55 Pa. St. 396, but the report does not give the pleadings. See, also, Express Co. v. Nichols, 33 N. J. Law, 434.

The general spirit of our decisions would perhaps lead to a more liberal rule than that applied in Connecticut, as above shown, but would not, I think, support the ruling complained of here. What was the special injury complained of in the declaration? Only that the plaintiff, by reason of the battery, was greatly hindered and prevented from doing and performing his work and business, and looking after and attending to his necessary affairs and avocations. Did this fairly apprise the defendant that the plaintiff would seek to show, not merely that he was disabled from pursuing a particular employment not mentioned, but also that, by reason of the inability to obtain laborers, his property went to ruin? If there is a natural and inseparable connection between the alleged injury and the damage, then the defendant should have been prepared to meet such a showing; otherwise, he was entitled to more specific allegations. But there is no such natural and inseparable connection. The circumstances must be altogether exceptional which would cause a farmer to lose his crops because he could not personally gather them. Indeed, according to the plaintiff's showing, the circumstances were exceptional here; for the injury to the hay is attributed to the difficulty of obtaining help to save it. But the defendant, had he been apprised of the purpose to claim for such a damage, might perhaps have shown that the difficulty was wholly imaginary, or that the plaintiff willfully suffered his hay to be injured, when he might have avoided it. It was his right to make such a showing, if the facts would warrant it. But he could not be aware of the necessity until he was notified that damage to the hay by reason of the battery was claimed.

In another particular I think the circuit judge erred in his rulings on evidence. The defendant not only offered to show abusive and provoking conduct by the plaintiff on the previous Sunday, but also that the plaintiff threatened him on that occasion. Had any facts been in evidence which tended to show that defendant, when he committed the assault, had reason to believe he was defending himself against an assault by the plaintiff, the proposed evidence of threats should have been received. But there were no such facts, and the judge properly overruled the offer. But, having done this, he permitted the plaintiff to prove the negative,—that he made no such threats. This evidence was foreign to the issue being tried, and, under ordinary circumstances, could have had no influence, but, coming immediately after the attempt by the defendant to show that he was threatened, was very well calculated to prejudice the jury against him. The evidence, if believed, must have convinced them that not only had the defendant committed a serious assault, but that he had done so under a wholly groundless pretense of fear, and had offered to give false evidence of threats in order to deceive and mislead the jury. It seems to me impossible that the negative evidence could have been harmless under such circumstances. The judgment, I think, should be reversed, and a new trial ordered. The other justices concurred.

SVENDSEN v. STATE BANK OF DULUTH.

(65 N. W. 1086, 64 Minn. 40.)

Supreme Court of Minnesota. Jan. 29, 1896.

Appeal from district court, St. Louis county; S. H. Moer, Judge.

Action by Becker Svendsen against the State Bank of Duluth. Verdict for plaintiff for nominal damages. From an order denying a new trial he appeals. Reversed.

John Rustgard, for appellant. Smith, McMahon & Mitchell, for respondent.

CANTY, J. During the time covered by the transactions hereinafter mentioned plaintiff was carrying on a mercantile business in Duluth, and the defendant was carrying on a banking business in that city. Plaintiff was a customer of the defendant, and kept a deposit in its bank, which he was in the habit of drawing out by means of checks, and which was held by the bank for the purpose of paying such checks. He had drawn on the bank a check for $42.15 in favor of one firm, and another for $54.60 in favor of another firm. These checks came through the clearing house, and were on the 20th day of October, 1893, presented for payment to the bank, and payment refused, for want of funds, though the plaintiff then had on deposit in the bank, subject to his check, the sum of $235.22. The checks were returned through the clearing house to the holders thereof. The reason why the bank refused to honor the checks was that it had by mistake charged up to plaintiff's account a note for $300, made by him, and held by it, which was not yet due, but which the bank by mistake supposed was due. This action was brought to recover damages for the refusal to pay the checks. Plaintiff did not allege or prove any special damages, but claimed to be entitled to recover substantial general damages. The court below on the trial ruled against him on this point, and ordered a verdict in his favor for nominal damages, to which he excepted, and from an order denying a new trial he appeals.

It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages. Rolin v. Steward, 14 C. B. 595; Schaffner v. Ehrman (Ill. Sup.) 28 N. E. 917; Bank v. Goos (Neb.) 58 N. W. 84; Patterson v. Bank, 130 Pa. St. 419, 18 Atl. 632; 3 Am. & Eng. Enc. Law, 225; 1 Suth. Dam. (2d Ed.) § 77. The case of Patterson v. Bank, supra, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of the opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable per se, and general damages may be recovered for such a slander. Townsh. Sland. & L. (4th Ed.) § 191; Odger, Sland. & L. (2d Ed.) 80. Respondent's position that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities. The case of Marzetti v. Williams, 1 Barn. & Adol. 415, cited by him, was an action in tort. The amount of the verdict is not reported, but it is very evident that it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought on contract, not in tort. The court held against the defendant on that point, and what is said beyond this is merely obiter, and was so regarded in the subsequent case of Rolin v. Steward. In Prehn v. Bank, L. R. 5 Exch. 92, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of Rolin v. Steward was expressly recognized. The case of Brooke v. Bank, 69 Hun, 202, 23 N. Y. Supp. 802, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration. It necessarily follows from the foregoing conclusions that the order appealed from must be reversed. So ordered.

NATIONAL COPPER CO. v. MINNESOTA MIN. CO.

(23 N. W. 781, 57 Mich. 83.)

Supreme Court of Michigan. June 3, 1885.

Error to Ontonagon.

T. L. Chadbourne, for appellant. Chandler, Grant & Gray and G. V. N. Lothrop, for appellee.

COOLEY, C. J. This is an action of trespass. The following is a statement of the case, as made for the plaintiff, for the argument in this court:

"The plaintiff and defendant are corporations, which for 25 years and more have been engaged in copper mining in Ontonagon county. Their mines adjoin each other. Each owns the land in fee on which its mine is situated. The plaintiff, in carrying on its mining operations, left a wall of rock, from 15 to 18 feet thick, next to the boundary line of defendant's mine. This was left as a barrier and protection to its mine against water or other encroachments from the Minnesota. The Minnesota left no such barrier; it not only worked up to the boundary line, but broke through into defendant's mine. About the year 1866 the plaintiff, at about 40 feet above its fourth level, and from 20 to 25 feet from the boundary line, drilled a hole, of the ordinary size, about one and one-half inches in diameter, and when the blast was fired it blew through into the opening which had been previously made by the defendant into the plaintiff's territory. The drill-hole was left through from two to two and one-half feet of solid rock. Capt. Chynoweth, then the agent of plaintiff, examined this hole and the surroundings, and immediately gave orders to cease work there. This was done as a further protection against the defendant. No work was done at this point after that until the winter of 1883–4. The plaintiff had no knowledge of any further trespass at this point until February, 1884, under the circumstances related hereafter. The pump of the defendant was stopped in 1870, and that of the plaintiff in 1871 or 1872. Plaintiff's mine filled up to the adit level in about five years. Since 1870 the defendant has worked its mine more or less upon tribute, and so did the plaintiff, until May, 1880, when it resumed work. In order to avoid liability for the trespass committed by it at the plaintiff's fourth level, (being the defendant's fifth level,) the defendant sought to show, and did show, another hole at the first level, between the two mines. A continuation of the inquiry showed that this hole also was about 20 feet from the boundary line, on the plaintiff's side, and that defendant had here trespassed 20 feet upon plaintiff's land. We do not think that the history of mining upon Lake Superior will disclose another instance of such reckless disregard of the rights of an adjoining mine-owner. This encroachment and trespass by the defendant at the defendant's fifth level occurred about the year 1859.

"In May, 1880, the plaintiff resumed mining operations and commenced to pump the water from its mine. The six-inch pump, formerly used by the mine, and which had always been adequate to keep the mine unwatered, proved wholly inadequate, and it was compelled to get a 12-inch pump, and even this was not sufficient in the spring; and in 1882 the water gained on them 120 feet, and in 1883, 222 feet, with the pump working night and day. Capt. Parnell, the agent of the plaintiff's mine, was thoroughly acquainted with it, having worked in the mine years before; he soon became convinced that the bulk of the water came from the defendant's mine. He found that the water came from the fourth level. He cleaned out the level, and, on reaching the point where the drill-hole had been made years before, he found that the rock had been all blasted away from the Minnesota side, and that the water was rushing through an opening from 20 to 25 feet high and 12 feet wide. When discovered there was a volume of water seven feet wide flowing from the Minnesota into the National. When the defendant made its second encroachment at this point does not clearly appear; according to the defendant's witness Spargo it was in 1871 or 1872. This witness was an employé of the defendant, and one of its tributers. He says he saw the hole from the Minnesota side, and it was then six to eight feet high, and from four to five feet wide. William George, a witness for defendant, last saw the hole in 1870 or 1871. It was then about a foot in diameter. The witness was then working for the defendant as tributer and captain. Thomas James was in charge of the mine. He admits that the defendant's tributers were then mining there. This same Capt. James has been in charge of the defendant's mine as agent ever since.

"It was not denied in the court below, and we presume will not be in this court, that the defendant committed these several acts of trespass. But, in proof of the fact, we refer to the admission of the agent Harris, the evidence that the track of a tram-road, sollars, and a system of timbering were found constructed from the fifth level of defendant's mine into this opening, and the testimony of plaintiff's witnesses already referred to. Furthermore, it is beyond dispute that the defendant knowingly and willfully committed these acts of trespass, and broke down the barrier which the plaintiff had so carefully left to protect its mine for all future time, and against all possible dangers.

"About 1870 the defendant concluded to abandon regular mining, stopped its pumps, and commenced what is known among miners as robbing the mine. It placed its tributers at work at the bottom of the mine, took out all the copper ground that could be found, took out the supports of the roof of the mine, and allowed it to settle or cave in. This was all done under the direction of the defendant's agent, James. The defendant's mine is situated upon a hill or mountain side. The result was that the surface of the ground became depressed, and openings were made in it. Defendant's agent, James, testified to openings of this character on the surface of the Minnesota, amounting in all to over 500 feet in length; some were 3 or 4 feet wide. Into these openings the water from rains and melting snow ran into the defendant's mine, and from thence flowed into the plaintiff's mine, through the opening at its fourth level. But for these openings the water would have run down the hillside. As one of defendant's own witnesses expressed it, 'There has been a general falling away of the bluff.' There were no such openings on the surface of the National. In fact, we everywhere find the plaintiff conducting its mining operations with due regard to the rights of adjoining owners; while we find the defendant conducting its operations in the most reckless disregard of such rights."

The above is a sufficient statement of the facts for a discussion of the principal question in the case, viz: Is the plaintiff's right of action barred by the statute of limitations?

The count in the declaration on which the parties went to trial alleged that the defendant, on March 15, 1882, and on divers days and times between that day and the commencement of suit, with force and arms broke down the partition wall between the mine of the plaintiff and the mine of the defendant, and let the water from its said mine into the mine of the plaintiff, and then and there filled the mine of the plaintiff with water, greatly damaging its timbering, workings, walls, and machinery, hindered and prevented the plaintiff from carrying on and transacting its lawful and necessary affairs and business, caused the plaintiff great damage and expense in removing water from its mine, etc.

The defendant pleaded the general issue, with notice that the statute of limitations would be relied upon. The plaintiff recovered a large judgment.

1. The time limited for the commencement of suit for trespass upon lands in this state is two years from the time the right of action accrues. How. St. § 8714. This action was commenced in May, 1884, and it is not claimed that damages for the original trespass can be recovered in it. The contention of the plaintiff may be succinctly stated as follows: (1) Had the plaintiff instituted suit within two years from the original trespass, the recovery would have been limited to such damages as were the direct and immediate result of the trespass. The subsequent flowage of water through the opening was not the direct, immediate, or necessary result of breaking down the barriers; therefore no damages could have been recovered therefor in an action so brought. (2) Two trespasses may be the result of one act. In other words, one trespass may cause another, and he who commits the wrongful act in such a case will be responsible for both trespasses. (3) In this case no action accrued for the flowage of water into the plaintiff's mine until the flowage actually took place, but when the flowage occurred as a result of defendant's wrongful act it was a trespass, and if it continued from day to day there was a continuous trespass for which repeated actions might be maintained.

Upon these positions the plaintiff plants its case, and unless they are sound in law the recovery cannot be supported. All right of recovery for the original trespass, which consisted in breaking through into the plaintiff's mine, was long since barred, and it is not claimed that there was, from the time of the first wrong, a continuous trespass which can give a right of action now. The merely leaving an opening between the two mines is not the wrong for which suit is brought, but it is the flowing of water through the opening which is complained of as a new trespass; the original wrongful act of the defendant in breaking through being the cause, and the injurious consequence when it happened, connecting itself with the cause to complete the right of action.

In support of its contention that the case before us may be regarded as one of continuous trespass from the first, several authorities are cited for the plaintiff, which may be briefly noticed. Among them is Holmes v. Wilson, 10 Adol. & E. 503. It appeared in that case that a turnpike company had built buttresses on the plaintiff's land for the support of its road. The act was a trespass, and the plaintiff recovered damages therefor; but this, it was held, did not preclude its maintaining a subsequent action for the continuance of the buttresses where they had been wrongfully placed. The ground of the decision was that in the first suit damages could be recovered only for the continuance of the trespass to the time of its institution. There could be no legal presumption that the turnpike company would persist in its wrongful conduct, and consequently, prospective damages, which would only be recoverable on the ground of such persistent wrong-doing, would not have been within the compass of the first recovery. The cases of Bowyer v. Cook, 4 C. B. 236; Thompson v. Gibson, 7 Mees. & W. 456; Russell v. Brown, 63 Me. 203; and Powers v. Council Bluffs, 45 Iowa, 652, are all decided upon the same principle. Cumberland, etc., Co. v. Hitchings, 65 Me. 140, was one of the wrongful filling up of a canal by a trespasser. It was held that the trespasser was under legal obligation to remove what he had unlawfully placed on the plaintiff's premises, and that, so long as he suffered the obstruction to remain, he was guilty of a continuous trespass from day to day.

In Adams v. Railroad Co., 18 Minn. 260 (Gil. 236,) and Troy v. Railroad Co., 23 N. H. 83, railroad companies which, by trespass, had entered upon the lands of individuals and constructed and began the operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued. The principle of decision in all these cases is clear and not open to question. In each of them there was an original wrong, but there was also a persistency in the wrong from day to day; the plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed.

To make these cases applicable, it is necessary that it should appear that the action of the defendant has been continuously wrongful from the first. Whether it can be so regarded will be considered further on. The plaintiff, however, does not, as we have seen, rely exclusively upon this view. Its case is likened by counsel to that of a farmer, whose fences are thrown down by a trespasser; the cattle of the trespasser on a subsequent day entering through the opening. In such a case it is said there are two trespasses: the one consisting in throwing down the fences, and the other in the entry of the cattle; and the right of action for the latter would accrue at the time the entry was actually made. The plaintiff also cites and relies upon a number of cases in which the act of the party which furnishes the ground of complaint antedates the injurious consequence, as the original trespass in this case antedated the flowing from which the plaintiff has suffered damage.

One of these cases is Bank of Hartford Co. v. Waterman, 26 Conn. 324. In that case action was brought against a sheriff for a false return to a writ of attachment. The falsity consisted in a misdescription of the land attached. When suit was brought, the period of limitation, if it was to be computed from the time the return was made, had already run; but under the statute the plaintiff was entitled to bring suit only after he had taken out execution and had a return made upon it, which would show a necessity for a resort to the attached lands. It was only after such a return of execution that the plaintiff would suffer even nominal damage from the official misfeasance; and it was therefore a necessary consequence that the time of limitation must be computed from that time, and not from the time of the false return.

Another case is that of McGuire v. Grant, 25 N. J. Law, 356, which is to be referred to the same principle. The defendant removed the lateral support to the plaintiff's land by an excavation, made within his own boundaries. Injury subsequently resulted to the plaintiff in consequence. The statute of limitations was held to run from the time the damage occurred; the excavation not being of itself a tort until damage resulted. The case of Bonomi v. Backhouse, El. Bl. & El. 622, was like the last in principle, and was decided in the same way.

The plaintiff also, in this connection, likens its case to that of one who, in consequence of a ditch dug upon his neighbor's land, has water collected and thrown upon his premises to his injury. It is not the act of digging the ditch that sets the time of limitation to running in such a case, but it is the happening of the injurious consequence. The case supposed, however, is not a case of trespass. The act of digging the ditch was not in itself a wrongful act. The owner of land is at liberty to dig as many ditches as he pleases on his own land, and he becomes a wrong-doer only when, by means of them, he causes injury to another. If he floods his neighbor's land the case is one of nuisance, and every successive instance of flooding is a new injury. But here, as in the case of a continuous trespass, prospective damages cannot be taken into account, because it must be presumed that wrongful conduct will be abandoned rather than persisted in, and that the party will either fill up his ditches or in some proper way guard against the recurrence of injury. Battishill v. Reed, 18 C. B. 696. Cases of flooding lands by dams or other obstructions to running water are cases of this description. Baldwin v. Calkins, 10 Wend. 169; Mersereau v. Pearsall, 19 N. Y. 108; Plate v. Railroad Co., 37 N. Y. 472. So are cases of diverting water, to the flow of which upon his premises the plaintiff is entitled. Langford v. Owsley, 2 Bibb, 215. So are cases of the wrongful occupation of a public street, whereby the access of the plaintiff to his premises is obstructed. Carl v. Railroad Co., 46 Wis. 625; S. C. 1 N. W. 295. Other cases cited for the plaintiff, and resting on the same principle, are Thayer v. Brooks, 17 Ohio, 489; Blunt v. McCormick, 3 Denio, 283; Winchester v. Stevens Point, 58 Wis. 350, 17 N. W. 3, 547; Union Trust Co. v. Cuppy, 26 Kan. 754; Spilman v. Navigation Co., 74 N. C. 675; Loweth v. Smith, 12 Mees. & W. 582.

The case of Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, was one of nuisance. A turnpike company made a covered drain with gratings at intervals and catchpits. In consequence of the insufficiency of the catchpits, or of their not being kept in proper condition, the plaintiff's colliery was flooded every time there was a heavy shower. In an action for this flooding it was held that every damage was a new injury and gave a new right of action. The ruling sustained the position taken for the plaintiff in the case, which was thus succinctly stated by counsel arguendo: "The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained."

The case before us was one of admitted trespass, from which immediate damage resulted. Had suit been brought at that time, all the natural and probable damage to result from the wrongful act would have been taken into account, and the plaintiff would have recovered for it. But there was no continuous trespass from that time on. The defendant had built no structure on the plaintiff's premises, was occupying no part of them with anything it had placed there, and was in no way interrupting the plaintiff's occupation or enjoyment. All it had left there was a hole in the wall. But there is no analogy between leaving a hole in a wall on another's premises and leaving houses or other obstructions there to incumber or hinder his occupation; the physical hindrances are a continuance of the original wrongful force, but the hole is only the consequence of a wrongful force which ceased to operate the moment it was made.

If, therefore, the plaintiff had brought suit more than two years after the original trespass, and before the flooding of its mine by water flowing through the opening had begun, and if the statute of limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, and there had been no repetition of the injury in the mean time to give a new cause of action. The mere continuance of the opening in the wall could not be a continuous damage. Lloyd v. Wigney, 6 Bing. 489.

The right of action, if any, for which the plaintiff can complain, must therefore arise from the flowing itself as a wrongful act; there being no longer any action for the original breaking, and no continuous acts of wrong from that time until the flowing began. The flowage caused a damage to the plaintiff; but damage alone does not give a right of action; there must be a concurrence of wrong and damage. The wrong, then, must be found in leaving the opening unclosed and permitting the water to flow through. It must therefore rest upon an obligation on the part of the defendant either to close the opening, because persons for whose acts it was responsible had made it, or to restrain water which had collected on its own premises from flowing upon the premises of the plaintiff to its injury. The latter seems to be the ground upon which the plaintiff chiefly relies for a recovery.

In the argument made for the plaintiff in this court stress is laid upon the fact that the damage which has actually resulted from the flooding could not have been anticipated at the time of the original trespass, and therefore could not then have been recovered for. This consideration, it is urged, ought to be decisive. But, while we agree that it is to be considered in the case for what it is worth, it is by no means necessarily conclusive. The plaintiff must fix some distinct wrong upon the defendant within the period of statutory limitation, or the action must fail; and there is no such wrong in this case unless the failure to prevent the flowing constitutes one. The original act of wrong is no more in question now, after having been barred by the statute, than it would have been if damages had been recovered or settled for amicably; nor do we see that it can be important in a case like the present, where the wrong must be found in the injurious flowing, whether there was or was not a wrong originally. If there was, it stands altogether apart from the wrong now sued for, with an interval between them, when no legal wrong could have been complained of. The mere fact that an opening was made by the defendant between the two mines, would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary, (Wilson v. Waddell, L. R. 2 App. Cas. 95;) and if the plaintiff had first done so, the defendant might have done the same at the same point, and in that way have made an opening rightfully. The difference between the case supposed and this, is that here the defendant was found to have gone beyond the boundary and committed a trespass. But suppose the defendant had then made compensation for the trespass, so far as it was then damaging; how would the case have differed from the present? The opening would remain, made by the defendant, through which, if the water was allowed to collect in his mine, it must eventually pass; and if he was under obligation to keep it within the bounds of his own premises, he would be liable for allowing it to pass; otherwise not. The fact that compensation was not actually made for the breaking away of the plaintiff's barrier is immaterial when the statute has run, as has been already explained.

The case of Clegg v. Dearden, 12 Q. B. 576, is not unlike in its facts the case before us. In that case, also, there had been a wrongful breaking through from one mine to another, and an injurious flowage of water through the opening. The facts were found by special verdict, and Lord Denman, in pronouncing judgment, said: "The gist of the action, as stated in the declaration, is the keeping open and unfilled up of an aperture and excavation made by the defendant into the plaintiffs' mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up of the excavation made by him on the plaintiffs' side of the boundary and within their mine. It is not, as in the case of Holmes v. Wilson, 10 Adol. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff. Nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of Thompson v. Gibson, 7 Mees. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiffs' land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation. Such an omission is neither the continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty. It was, however, contended on the part of the plaintiffs, that, admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made;'' but "the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon the breach of any such duty, if it exists, but upon the omission to fill up the aperture made by them in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of not guilty."

If this case was rightly decided, it should rule the one before us. It has been followed by the supreme court of Ohio in Williams v. Coal Co., 37 Ohio St. 583, in a case which also closely resembles this upon its facts, and is not distinguishable in principle. It seems to us that these cases are sound in law as well as conclusive. The only wrongful act with which the defendant is chargeable, was committed so long before the bringing of suit that action for it was barred. Had suit been brought in due time, recovery might have been had for all damages which could then have been anticipated as the natural and probable result of the wrongful act. If the particular damages which have been suffered could not then have been anticipated, it is because it could not then be known that the defendant would cease mining operations and the plaintiff would not. There could be no flowing from one mine into the other while both were worked; and had the plaintiff ceased operations and the defendant continued to work, the defendant would have suffered the damage instead of the plaintiff. But neither party was under obligation to keep its mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it. And had the plaintiff brought an action within two years from the time of trespass, its recovery would necessarily have been had with this undoubted right of abandonment in view. But a jury could not have awarded damages for any exercise of a right, and they could not, therefore, have given damages for a possible injury to flow from such an abandonment. This is on the plain principle that the mere exercise of a right cannot be a legal wrong to another, and if damage shall happen, it is damnum absque injuria.

This view of the case is conclusive; but there is another that is equally so. The wrong to the plaintiff consisted in breaking down the wall which had been left by it in its operations. If any damage might possibly result from this which was not then so far probable that a jury could have taken it into account in awarding damages, the plaintiff was not without redress. It would have been entitled in a suit then brought to recover the cost of restoring the barrier which had been taken away; and if it had done so, and made the restoration, the damage now complained of could not have happened. It thus appears that complete redress could have been had in a suit brought at that time; and, that being the case, the plaintiff is not entitled to recover now for an injury for which an award of means of prevention was within the right of action which was suffered to become barred. The right which then existed, being a right to recover for all the injury which had then been suffered, including the loss of the dividing barrier, it would not have been competent for the plaintiff, had suit then been brought, to leave the loss of the barrier out of account, awaiting possible special damages to flow therefrom as a ground for a new suit. The wrong which had then been committed was indivisible; and the bar of the statute must be as broad as the remedy was which it extinguishes.

The judgment must be set aside and a new trial ordered.

The other justices concurred.

DARLEY MAIN COLLIERY CO. v. MITCHELL.

(11 App. Cas. 127.)

House of Lords, Feb. 8, 1886.

Appeal from a decision of the court of appeal. 14 Q. B. Div. 125.

The respondent having brought an action against the appellants for damages for injuries done to his cottage by subsidence in the ground on which they stood, caused by the improper working of the defendants' colliery, among other defenses they set up the statute of limitations. At the trial, before Hawkins, J., at the Leeds summer assizes, 1883, the following facts were proved or admitted: The plaintiff was the freeholder of six perches of land and three cottages thereon, in the parish of Darfield, Yorkshire. The defendants were lessees of a seam of coal under the plaintiff's land, and worked the coal up to 1868. In consequence of that working, a subsidence of the land took place in 1868, causing injury to the plaintiff's cottages, in respect of which the defendants were required to and did then execute repairs. The defendants never worked the coal after 1868, but in 1882 a further subsidence of the land took place, causing further injury to the cottages. For this injury this action was brought, in December, 1882.

The special jury having been discharged by consent, Hawkins, J., on further consideration, entered judgment for the defendants upon the defense of the statute of limitations, the plaintiff's counsel admitting that he could not distinguish the case from Lamb v. Walker, 3 Q. B. Div. 389. The court of appeal (Brett, M. R., Bowen and Fry, L. JJ.) reversed this decision, and entered judgment for the plaintiff for damages to be assessed by an arbitrator. 14 Q. B. Div. 125. From this decision, the defendants appealed.

During the argument of the respondent's counsel before the house, a discussion took place as to the cause of the subsidence in 1882, and in the result the following statement was agreed to, in writing, between the appellants' and respondent's counsel: That after the partial subsidence, in 1868, the strata remained practically quiescent until the working of the coal in the next adjoining land, in 1881, which working caused a "creep" and a further subsidence; that, if the owner of the adjoining land (one Cooper) had not worked his coal, there would have been no further subsidence; but the appellants admit that if the coal under the respondent's land had not been taken out, or if the appellants had left sufficient support under the respondent's land, then the working of the adjoining owner would have done no harm.

S. B. Somerville, for appellants Baxter & Co. Ridsdale & Son, for respondent Saunders, Nicholson & Reeder.

LORD HALSBURY. My lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessees of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property, by causing it to subside. The defendants, before and up to the year 1868, have worked—that is to say, excavated—the seams of coal of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability, and made satisfaction. There were other subsidences after this, and, as the case originally came before your lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now, by an admission at your lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868; that, if he had not done so, there would have been no further subsidence; and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged; and the fact that the damage only manifests itself later on, by stages, does not alter the fact that the damage is there. And so of the more complex mechanism of the human frame; the damage is done in a railway accident; the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words "cause of action" are somewhat ambiguously used in reasoning upon this subject. What the plaintiff has a right to complain of in a court of law in this case is the damage to his land, and by the damage I mean the damage which had in fact occurred; and, if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted.

Since the decision of this house in Backhouse v. Bonomi, 9 H. L. Cas. 503, it is clear that no action would lie for the excavation. It is not therefore a cause of action. That case established that it is the damage, and not the excavation, which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action, for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In Rowbotham v. Wilson, 8 El. & Bl. 123, 157, Cresswell, J., said that the owner of the mines might have removed every atom of the minerals without being liable to an action, if the soil above had not fallen; and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues. If, by the hypothesis, the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog, which bites his neighbour. Can it be contended that, when the bitten man brings his action, he must assess damages for all possibility of future bites? A man stores water artificially, as in Rylands v. Fletcher, L. R. 3 H. L. 330. The water escapes, and sweeps away the plaintiff's house. He rebuilds it, and the artificial reservoir continues to leak, and sweeps it away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir? With respect to the authorities, the case of Nicklin v. Williams, 10 Exch. 259, was urged by the attorney general as an authority upon the question now before your lordships, by reason of some words attributed to Lord Westbury in Backhouse v. Bonomi, 9 H. L. Cas. 503, 512. If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Baron Parke, in that case, delivered the judgment against the plaintiffs, recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in Backhouse v. Bonomi, 9 H. L. Cas. 503, 512, since, if that had been law, there could have been no answer to the plea of the statute of limitations in that case. It is difficult to follow the master of the rolls when he says it was not necessary to overrule Nicklin v. Williams, 10 Exch. 259, by that decision. It seems to me to have been the whole point decided in Nicklin v. Williams, 10 Exch. 259; and how that case so decided can be an authority for anything I am at a loss to understand.

I think the decision of this case must depend, as matter of logic, upon the decision of your lordships' house in Backhouse v. Bonomi, 9 H. L. Cas. 503, 512; and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but, if such considerations were permissible, I think Cockburn, C. J., in his judgment in Lamb v. Walker, 3 Q. B. Div. 389, establishes the balance of convenience to be on the side of the law, as established by Backhouse v. Bonomi, 9 H. L. Cas. 503, 512. I cannot logically distinguish between a first and a second or a third or more subsidences; and after Backhouse v. Bonomi, 9 H. L. Cas. 503, 512, it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J., has said, and I think rightly, that he might remove every atom of the mineral.

The wrong consists, and, as it appears to me, wholly consists, in causing another man damage; and I think he may recover for that damage as and when it occurs.

For these reasons, I think that the judgment appealed from should be affirmed, with costs.

LORD BLACKBURN. My lords, at the close of the argument I came to the conclusion that the judgment should be reversed; and prepared and circulated an opinion containing the reasons which led me to that conclusion. All three of the other noble and learned lords who heard the argument have come to the conclusion that the judgment should be affirmed, and that must be the judgment of the house. I think it better to read the reasons which I had before written.

This is an appeal against an order of the court of appeal, by which it was ordered that the judgment of Hawkins, J., delivered, on further consideration, on the 18th of December, 1883, should be reversed, and judgment entered for the plaintiff for damages to be assessed by an arbitrator to be agreed upon, with costs. Before this house can say whether this order is right or not, it is necessary to know what was the case on which Hawkins, J., directed judgment, which this order reverses, to be entered for the defendants. The writ was issued on the 27th of December, 1882.

There was an alternative defense that the causes of action did not, nor did any of them, first accrue to the plaintiff at any time within six years before the commencement of the action; and therefore it lay on the plaintiff to give evidence of some cause of action subsequent to the 27th of December, 1876.

I think it sufficiently appears in Hawkins, J.'s, judgment, that the defendants had worked out the seams of coal of which they were lessees as long ago as 1868, and that they had done nothing from that time. And as the defendants seem to have proved and relied on the fact that very considerable subsidences had occurred between 1868 and 1871, which injured the plaintiff's premises, and that the defendants had been called upon to do, and had paid for, repairs rendered necessary, it is clear that the original working was such as to give rise to a cause of action as early as 1871, and that the plaintiff had then known it. Lamb v. Walker, 3 Q. B. Div. 389, was then cited. With a view to enable the plaintiff's counsel to fully consider that authority, it was arranged that the jury should be discharged, and that the case should be reserved for further consideration, it being expressly admitted by the plaintiff that damage was done by subsidence in 1868.

On further consideration, the plaintiff's counsel is stated by Hawkins, J., to have admitted that judgment must be entered for the defendants, unless Lamb v. Walker, 3 Q. B. Div. 389, which he intended to question in a court of appeal, was overruled.

I think it convenient here to see what was the decision in Lamb v. Walker, 3 Q. B. Div. 389, so as to see whether, while it stands unreversed, it was decisive of the case before Hawkins, J. Manisty, J. (at page 391), quotes so much of the plaintiff's statement of claim as was material in that case. There was a first claim, on which the referee gave ¼d., which I do not notice. I think the fifth and sixth paragraphs are, in effect, the same as the amended statement of claim in the action now at bar, and set out in the appendix (page 7). But the only plea in Lamb v. Walker, 3 Q. B. Div. 389, was payment into court of £150, and the issue joined was whether that was enough. That was referred, and it was on the award that the question was raised. The two material findings on the award are stated at page 392: "(2) I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action * * * at £400. (3) I estimate the future damage which will be sustained by the plaintiff * * * at £150." He therefore directed judgment to be entered at £400, deducting the £150 paid into court from those two sums, amounting together to £550.

The question was raised on a rule to reduce the damages, and was "whether the plaintiff was, in point of law, entitled to recover the sum of £150, which the referee finds will be sustained by the plaintiff by reason of the defendant's acts." The decision in Lamb v. Walker, 3 Q. B. Div. 389, was that he was so entitled. And I think it was rightly thought that, if damages subsequent to a writ issued in 1871 could be recovered in an action on that writ, they were included in the cause of action then existing, and, consequently, that decision, which was binding on Hawkins, J., was, at that stage of the proceedings, conclusive against the plaintiff.

In Lamb v. Walker, 3 Q. B. Div. 389, Cockburn, L. C. J., differed from the majority of the court. He said: "Taking the view I do of the leading case of Backhouse v. Bonomi, 9 H. L. Cas. 503, I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage; that is to say, anticipated damage expected to occur, but which has not actually occurred, and which may never arise." He enters into elaborate reasoning to support this opinion, which I shall examine presently. I think, if that opinion had prevailed in Lamb v. Walker, 3 Q. B. Div. 389, and a judgment had been given accordingly, that decision would have been, not only not an authority against the plaintiff in this case, but an authority in his favour as far as the defense of the statute of limitations is concerned.

There must have been some understanding between the counsel for the plaintiff and for the defendants in this case as to what was to be done in case the final decision on this very important question was in conformity with the opinion of Cockburn, L. C. J.; and I think, though I wish it had been expressly stated, it must now be taken that the defendants' counsel agreed that he would not, on the evidence then before the court, ask for a verdict on any of the other defenses, but would in that case consent to have the damages settled by arbitration.

Cockburn, L. C. J., could not, in Lamb v. Walker, 3 Q. B. Div. 389, have meant to go so far as to say that if a house had been shaken, and was evidently going to fall, but had not yet completely fallen, when the writ issued, the plaintiff could only recover for what had already occurred, and would have to bring a fresh action when a further chimney fell. He has not quite sufficiently guarded himself from saying so.

In the present case, there being obscurity in the statement of the facts, it was, somewhat late in the day, but with the assent of the house, agreed to add this further admission: "That, if the owner of the adjoining land [one Cooper] had not worked his coal, there would have been no further subsidence; but the appellants (defendants) admit that if the coal under the respondent's (plaintiff's) land had not been taken out, or if the appellants (defendants) had left sufficient support under respondent's (plaintiff's) land, then the working of the adjoining owner would have done no harm." I do not understand this to be an admission that the subsidence was occasioned by the removal by the defendants of other coal than that the removal of which occasioned the subsidence in 1871. Such an admission would have raised a different question, and one the solution of which might have required a further investigation as to the facts.

I will now proceed to consider the case exactly as if it was on appeal from Lamb v. Walker, 3 Q. B. Div. 389. I must first observe that Manisty, J., in that case says (3 Q. B. Div. 394): "It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all." And it is not disputed by Cockburn, L. C. J., that the rule is established that "damages resulting from one and the same cause of action must be assessed and recovered once and for all." 3 Q. B. Div. 403. He joins issue with Manisty, J., on the application of this rule to cases arising from subsidence occasioned by mining so as to remove support. And I think that this rule is established as the general rule of law. I do not think it is one of those rules of law which depend upon natural justice. I think it is an artificial rule of positive law, introduced on the balance of convenience and inconvenience. I think that, if it were res integra, a great deal might be said against the expediency of the rule. I know nowhere where the objections to the expediency of the rule are more clearly and forcibly stated than by the lord chief justice. 3 Q. B. Div. 405.

But I think it was not disputed in the argument that at all events, when the act complained of is one which would entitle the plaintiff to maintain an action, and recover, as a matter of law, at least nominal damages, without any proof of damage in fact, the rule is firmly established; and I think all three judges in the court below agree that the question is, what was the cause of action in this case? They adopt the reasoning of Cockburn, L. C. J., in Lamb v. Walker, 3 Q. B. Div. 389, that it logically follows from Bonomi v. Backhouse, El. Bl. & El. 622, that there are independent and distinct causes of action, on each fresh distinct cause of damage, though arising from the same act of disturbing the soil. Fry, L. J., puts this very clearly. He does not think that it is concluded by authority, and says: "I think we are bound to determine this question on principle. Now, with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry, what is the cause of action in a case of this description?" In this I completely agree, but I have not been able to agree with the reasoning by which it is sought to be made out that it logically follows from the decision in Bonomi v. Backhouse, El. Bl. & El. 622, in this house, that there are fresh causes of action at each fresh subsidence arising from the old disturbance of the strata, occasioning fresh damage to the same property. I decide nothing on a question which does not here arise, viz. whether, if the same person has two separate tenements, say, A. on the north of the seam worked by the defendant, and B. on the south of it, and damage has actually occurred to A., and he sues for the damage done to it, he is bound to join in the action any claim which he has or hereafter may have as to B. Whilst the recent decision of Brunsden v. Humphrey, 14 Q. B. Div. 141, in the court of appeal, stands unreversed (and I do not mean to cast any doubt on it), it would seem that he is not.

It is desirable to see what the case of Bonomi v. Backhouse, El. Bl. & El. 622, really was. The writ was issued on the 20th of May, 1856. The declaration alleged that the plaintiffs, as reversioners of certain buildings in the occupation of Parkin, were entitled to have the said messuages and buildings supported by the mines and soil "contiguous and near to and under the said messuages and buildings," and then in the usual way alleged working by the defendant, disturbing the support, by which the walls of the said messuages were cracked and injured, and the ground on which the said messuages and buildings stood subsided. The pleas were (1) not guilty; (2) denial of Parkin's occupancy as tenant as alleged; (3) denial of the reversion being in the plaintiffs as alleged; (4) that the plaintiffs were not entitled to have the said messuages and buildings, or either of them, supported, to wit, by the mines, earth, and soil underground contiguous; (5) that the said alleged causes of action did not accrue within six years before this suit. The verdict was entered for the plaintiffs, subject to a special case. One very important question raised in and decided by that case was as to the rights of buildings to support, as distinguished from the rights of the natural soil to the support. With that we are not now concerned. The arbitrator in detail stated very clearly, and, I have no doubt, very accurately, the way in which the cleety coal in the Auckland coal field was worked. I doubt if this account would be found to be applicable in most coal fields. I think I may say that it would not in some. I do not know what is the nature of the strata in the Yorkshire coal field, where the present coal lies. But it appeared quite clear on his statement of the case that, though it was apparent in 1850 (more than six years before the action) that, unless steps were taken to stop the progress of the thrust then in operation, the plaintiff's houses would be injured by the thrust, yet no actual injury was sustained until 1854 (less than six years before the action). He also found that the thrust would continue, and would produce damage in future. There was also a finding, at page 631, that it was possible to stop the thrust; "but the expense of so doing would have been very great, and would, on the whole, have amounted to a much larger sum than the value of the property injured." He then proceeded to find in detail the facts on which it was to depend how the issues should be entered, and then proceeded as follows: "If the verdict is to be entered for the plaintiffs upon the issues joined on the 1st, 4th, and 5th pleas, another question for the court is (4) whether the defendant is responsible for all the damage which has been sustained by the plaintiffs by reason of the injuries to their said messuages and buildings above described, or for any and what part of that damage, *and whether he is responsible in any and what respect for the probable future damage which may be occasioned in manner above described*, or for the damage occasioned by the diminution in value of the said messuages and buildings by reason of their insecure state and condition, or the injuries which will probably be hereafter occasioned by the further progress of the thrust as above mentioned." Had this question, and more especially the part of it I have marked in italics, been answered, it would have decided the question afterwards raised in Lamb v. Walker, 3 Q. B. Div. 389. But, as the majority of the queen's bench decided that the issue on the fifth plea should be entered for the defendant, the fourth question required no answer from those three judges, and received none. Wightman, J., does give an answer at page 638, which I think, as far as it goes, is in favour of Cockburn, L. C. J.'s, view in Lamb v. Walker, 3 Q. B. Div. 389.

The defendants do not appear to have thought the fourth question of importance, for nothing whatever was said in the argument in the exchequer chamber about it; and though the expression in the judgment indicates approval of Nicklin v. Williams, 10 Exch. 259, so far as regarded the principle "that no second or fresh action can, under such circumstances, be brought for subsequently accruing damage, all the damage consequent upon the unlawful act being in contemplation of law satisfied by the one judgment or accord," and seems in favour of the view taken by the majority in Lamb v. Walker, 3 Q. B. Div. 389, yet I do not think it can be properly said that the court of exchequer chamber, in their judgment, put their minds to that question, which was not much, if at all, argued before them. Before the case was taken into this house, the damages were agreed on at £500 (how or on what principle we do not know); and, that being so, the house had no occasion to decide anything on that fourth question. There seems to have been no allusion to it in the argument, and I think no one of the lords makes any reference to it.

I think that Backhouse v. Bonomi, 9 H. L. Cas. 503, does decide that there is no cause of action until there is actual damage sustained, and does decide that the court of exchequer erred when, in Nicklin v. Williams, 10 Exch. 259, they said that there was an injury to the right as soon as the support was rendered insufficient, though no damage had occurred. But I do not think that it all follows from this that the act of removing the minerals to such an extent as to make the support insufficient is an innocent act, rendered wrongful by the subsequent damage. That would be a great anomaly, for I think there is no other instance in our law where an action lies in consequence of damage against a person doing an innocent act. There are many where no action lies against the doer of an improper act, unless and until damage accrues. One is alluded to by Lord Cranworth. The cause of action against the speaker of words not actionable per se consists in the speaking of the words and the damage. It was therefore held in Littleboy v. Wright, 1 Lev. 69, on error from the palace court, that an inferior court had no jurisdiction over an action for calling the plaintiff a whore, whereby the plaintiff lost her marriage, unless both the speaking of the words and the loss of the marriage were averred and shewn to have occurred within the jurisdiction. But the cause of action was as much the speaking of the words as the damage. It is quite clear that, if the words were spoken under such circumstances as to be privileged, no amount of damage could give rise to an action. So, where a man beats another's servant, no action arises to the master until there is damage by the loss of the service; but no amount of damage would give the master an action if the beating was justifiable. And if a man, in breach of the duty to take reasonable care in the management of a horse in a public street, gallops along it, no action lies except at the instance of a person who has suffered damage. But no amount of damage will give a cause of action against the owner of the horse unless a breach of duty is shewn. And I think that there is a duty in the owner of land on which his neighbour's land rests to respect it, and take care that he does not injure that support. This is subject to many qualifications, some of which were considered in Corporation of Birmingham v. Allen, 6 Ch. Div. 284. All I think that is really decided in Backhouse v. Bonomi, 9 H. L. Cas. 503, at least in this house, is that where there is a breach of that duty, followed by damage, there is a cause of action, and that, until there is damage, there is no more cause of action for the breach of duty than there would be in a person who saw the breach of duty in the reckless rider of a horse, but was not damaged, though in peril.

Littledale, J., said in Hodsoll v. Stallebrass, 11 Adol. & E. 301, speaking of an action by a master for beating his servant per quod servitium amisit: "It is argued that a fresh action might be brought from time to time; but that is not so, the action being founded, not upon the damage only, but upon the unlawful act and the damage. Without the special damage, this action would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act, and fresh damage."

This, I think, indicates the real principle. No authority was cited on the argument against this except a dictum of North, C. J., in the report of Lord Townsend v. Hughes, 2 Mod. 151, where he is reported to have said: "This is a civil action, brought by the plaintiff for words spoken of him, which, if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but, if a particular averment of special damages makes them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action." North, C. J., was a great lawyer; and, though at the moment engaged in maintaining what seems a very bad cause, no dictum of his is to be slighted. But this, if he did say it, was utterly irrelevant, for his opinion was that the words spoken were actionable, without any special damage; such, in the case before him, being neither averred nor proved. I cannot therefore attach much weight to this dictum, and it has never, I think, been acted upon. I come, therefore, to the conclusion that the opinion of the majority in Lamb v. Walker, 3 Q. B. Div. 389, was the better opinion.

I should say that I take a very different view of Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, 784, from that taken by the master of the rolls. I think that was an action for maintaining a nuisance, which, from time to time, caused fresh damage. What Williams, J., there says, is: "The true answer to this objection, as it seems to me, is that no fresh cause of action arises from each fresh damage, but that where there is not only a fresh damage, but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action."

This was how the court of error in Ireland understood that case in Devery v. Canal Co., 9 Ir. R. C. L. 194. So understanding it, and approving of it, Palles, C. B., in that case, gave judgment for the plaintiff. How that case is in any way in conflict in principle with Nicklin v. Williams, 10 Exch. 259, I am unable to perceive.

Bowen, L. J., says that, "applying the reasoning in Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, 784, it seems to me that there has really been not merely an original excavation or act done, but a continual withdrawal of support." If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts. One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked out seam lay would be liable to an action for continuing a nuisance. Surely, the facts cannot be such as would produce that effect. And, unless they are, I do not think that they can make the defendants responsible on this ground.

I therefore think that the order appealed against should be reversed, and the judgment of the 18th of December, 1883, restored. The noble and learned lords who heard the case have each of them come to an opposite conclusion, and the order of the house will be in conformity with their view.

LORD BRAMWELL. My lords, laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted. Moreover, such propositions are often and justly called "obiter." With these dangers before my eyes, I shall, nevertheless, venture on some abstract propositions.

It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues, he must sue for all his damage,—past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But, if he sustained two injuries from a blow,—one to his person, another to his property; as, for instance, damage to a watch,—there is no doubt that he could maintain two actions in respect of the one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him. I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libeled by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss,—certainly if the case in Siderfin is right. But it is not necessary to decide this.

I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act. For example, A. says to B. that C. is a swindler. B. refuses to enter into a contract with C. C. has a cause of action against A. D., who was present and heard it, also refuses to make such a contract. Surely, another action would lie. And so one would think if B. subsequently refuses another contract. Of course, one can see that frauds might be practiced. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. And perhaps one might apply the same test. Would not the first right of action pass to the trustees of C. if he became bankrupt? If the second loss was after the bankrupt's discharge, it would not.

There is still another class of cases to be considered, viz. those where the act causing damage is not in itself wrongful. No easier case can be taken than the above ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and 50 feet of the neighbouring soil fell in, the right of action would be in respect of those 50 feet, and not only in respect of what had fallen in, but what would in future fall in along the 50 feet. But, if afterwards the other 50 feet fell in, there would be a fresh cause of action. Surely, this must be so. If 10 feet at one end fell in, and afterwards 10 feet at the other, it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. The attorney-general denied this, and was driven to do so. But suppose A. owned the adjoining property on one side, and B. that which was at right angles to it; there must then be two causes of action.

Now, apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the "acts"—including in that word omissions—of the defendants. One a removal of coal, and nonproviding of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including, perhaps, the coal which caused the first subsidence, but doubtless also a removal of coal extending to a greater distance, and not immediately under the plaintiff's land, and the nonproviding against the consequences, which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action. I think, therefore, the judgment was right.

It seems to me not to matter that the subsidence was of the same spot, nor that the immediate cause of the second subsidence was the nonexistence of coal underneath that spot. Two damages have been occasioned to the plaintiff,—one, directly and immediately by the removal of the coal under his surface; the other, by that and removal of other coal, and consequent creeping and further subsidence. The attorney general, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested.

Of course, one can see the danger and inconvenience that will follow. This damage accrues many years after the defendants' act or omission which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way; for, if the defendants are right, it follows that, on the least subsidence happening, a cause of action accrues once and for all, the statute of limitations begins to run, and the person injured must bring his action, and claim and recover for all damage, actual, possible, or contingent, for all time.

As to the authorities, Backhouse v. Bonomi, 9 H. L. Cas. 503, seems clearly in the plaintiff's favour. Indeed, I have thought of limiting my judgment to the following remark on it. It decided that the excavation of the coal was not wrongful, and that the cause of action accrued when the damage arose. The damage now complained of arose at the last subsidence. That subsidence was no part of or continuance of the former subsidence, nor caused by the same cause only, but by a further cause; in this sense, that without this cause the subsidence would not have taken place. Therefore no cause of action in respect of it arose till it happened.

LORD FITZGERALD. My lords, the real, though not the formal, question for your lordships' determination, is whether Lamb v. Walker, 3 Q. B. Div. 389, was correctly decided. My noble and learned friend (Lord BLACKBURN) rightly deals with this appeal in the same light as if it was an appeal from Lamb v. Walker, 3 Q. B. Div. 389. I do not propose to follow my noble and learned friend in his instructive examination of Lamb v. Walker, 3 Q. B. Div. 389, and Backhouse v. Bonomi, 9 H. L. Cas. 503, and his criticisms on those cases; but I think that we may deduce from the authorities some propositions as now settled in law, and applicable to the circumstances of the appeal now before your lordships' house, and to similar cases. I proceed to state those propositions, though in doing so I am conscious of the danger pointed out by my noble and learned friend, Lord BRAMWELL.

(1) That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface, in the absence of any binding agreement to the contrary.

(2) That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface.

(3) That the excavation and removal of the minerals does not, per se, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface.

(4) But that when, in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action.

The foundation of the plaintiff's action, then, seems to be that, although the excavations of the minerals were acts by the defendants in the lawful enjoyment of their own property, yet, when subsequently damage arose therefrom to the plaintiff in the enjoyment of his property, the defendants became responsible. For, although the law encourages a man to the free use of his own property, yet if, in doing a lawful thing in the enjoyment of that property, he occasions damage to his neighbour, which might have been avoided, he will be answerable for that damage whenever it occurs.

Now, as to the cause of action in 1868; there is no doubt that the mere excavation prior to or in 1868 was legitimate, and not of itself alone the foundation of any right of action; but when the subsidence of that year took place, and caused damage to the plaintiff's houses, then the defendants became liable to make good that loss, because, though their acts were in the lawful use of their own property, yet the injurious consequences to the plaintiff might have been avoided. It is the disturbance, then, when it arises, that is the cause of action, and not the prior legitimate acts of the owners of the minerals in the lawful enjoyment of their own property.

But, although this be true, yet, still, the question which arose in Lamb v. Walker, 3 Q. B. Div. 389, and which was not expressly decided by this house in Backhouse v. Bonomi, 9 H. L. Cas. 503, remains now to be considered and finally decided. There was a subsidence in 1868, causing special damage, giving the plaintiff a cause of action; and in respect of that damage he accepted compensation, which, it seems agreed, is equivalent to a recovery of damages in an action if such an action had then been instituted.

In 1882 a fresh and distinct subsidence took place, causing special damage to the plaintiff. It was admitted before your lordships, rather late in the argument, but for the purpose of better enabling your lordships to come to a conclusion: "That after the partial subsidence, in 1868, the strata remained practically quiescent until the working of the coal in the next adjoining land by the owner thereof, in the year 1881, which working caused a creep and a further subsidence." And further: "That, if the owner of the adjoining land had not worked his coal, there would have been no further subsidence, and that if the coal under the respondent's (plaintiff's) land had not been taken out, or if the appellants (defendants) had left sufficient support under the respondent's (plaintiff's) land, then the working of the adjoining owner would have done no harm."

It will be observed on these admissions that the partial subsidence of 1868 had practically ceased, and that a fresh creep and subsidence took place in 1882, which would not have taken place if the defendants had left sufficient natural support under the plaintiff's land, or, we may add, had substituted adequate artificial support.

There can be no doubt that, though there has been no act of commission by the defendants since the completion of the excavation of 1868, yet, if there had been no subsidence causing damage to the plaintiff prior to that of 1882, the present action could be maintained. But it is alleged that as the plaintiff had a complete cause of action in 1868, arising from the prior excavation and the subsidence of 1868, the statute of limitations then commenced to operate, and has barred the present action. It was further argued that in 1868 the plaintiff could and ought to have insisted on recovering once and for all any damage that might arise prospectively from the excavation of 1868, according to the rule of law which, in order to prevent a multiplicity of actions, provides that damages resulting from one and the same cause of action must be assessed and recovered once and for all.

That rule was applied by the majority of the court in Lamb v. Walker, 3 Q. B. Div. 389, and is not controverted. It is not inflexible, and admits of exceptions.

We have to consider what was the cause of action in 1868, and whether the cause of action of 1882 (the creep and subsidence of 1882) is one and the same cause of action as that of 1868. If it is so, then the defendants are entitled to succeed on the defense of the statute of limitations.

This appeal represents a class of cases peculiar and exceptional, to meet which, and to avoid grave inconvenience, if not injustice, our flexible common law has somewhat moulded itself. I deprecate discussing some of the arguments addressed to us, which seemed to me to be too fine, such as, for instance, whether the original act of the defendants was "innocent," or "perfectly innocent." The question here is not whether the original act of the defendants was "innocent," but whether the defendants have occasioned damage to the plaintiff without any inevitable necessity.

I am of opinion that Cockburn, L. C. J., in the case of Lamb v. Walker, 3 Q. B. Div. 389, and the court of appeal in the case before us, were respectively right in resting on Backhouse v. Bonomi, 9 H. L. Cas. 503, and deducing from it a principle which governs the question.

Backhouse v. Bonomi, 9 H. L. Cas. 503, is not satisfactorily reported. We gather from the report in your lordships' house with some difficulty what was actually decided. Mr. Manisty, in his argument in that case at your lordships' bar, puts it thus: "The act done was a perfectly innocent act at the time it was done. The argument on the other side is that it must be treated as having been injurious, because it might afterwards become so. If the action had been brought when the act was first done, the answer would have been that the defendant had a right to do the act, and that no damage had been occasioned." Lord Westbury says: "I think it is abundantly clear, both on principle and authority, that, when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and the action may then be maintained." And Lord Cranworth adds: "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is to the ordinary enjoyment of his land, and, until that ordinary enjoyment is interfered with, he has nothing of which to complain. That seems the principle on which the case ought to be disposed of."

It seems to me that Backhouse v. Bonomi, 9 H. L. Cas. 503, did decide that the removal of the subjacent strata was an act (I will not say an innocent act) done in the legitimate exercise of ordinary ownership, which, per se, gave no right of action to the owner of the surface, and that the latter had no right of action until his enjoyment of the surface was actually disturbed. The disturbance then constituted his right of action.

There was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action.

If this view is correct, then it follows that the cause of action now insisted on by the plaintiff is not the same cause of action as that of 1868, but is in point of law, as it is physically, a new and independent cause of action, arising in 1882, and to which the defense of the statute of limitations is not applicable.

The necessary conclusion is that Lamb v. Walker, 3 Q. B. Div. 389, was not correctly decided, and that the able reasoning of Cockburn, L. C. J., in that case ought to have prevailed. Order appealed from affirmed, and appeal dismissed, with costs.

JOSEPH SCHLITZ BREWING CO. v. COMPTON.

(32 N. E. 693, 142 Ill. 511.)

Supreme Court of Illinois. Nov. 2, 1892.

Appeal from appellate court, Third district.

Action on the case by Sophie Compton against the Joseph Schlitz Brewing Company. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is an action on the case, begun on April 17, 1890, in the circuit court of Sangamon county, by the appellee against the appellant company. In the trial court the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the appellate court. The declaration consists of two counts. The first count alleges that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant, to wit, on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent, and improper a manner that on said day and afterwards, "and before the commencement of this suit," large quantities of rain water flowed upon, against, and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement, and other parts thereof, and weakened, injured, and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier, and owner of said messuage and premises, in which she and her family dwelt, and the defendant, to wit, on said day, caused quantities of water to run into, against, and upon the same, and the walls, roofs, floors, cellars, etc., thereof, and thereby greatly weakened injured, wetted, and damaged the same. By reason whereof said premises became and were and are damp, incommodious, and less fit for habitation. The plea was not guilty. The proof tends to show that plaintiff's building is a two-story brick building, with a cellar underneath, the front room on the first floor being used as a butcher's shop, and the rest of the building being used as a dwelling; that her building was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about 60 feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof, which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall, and some of it into her windows and cellar from the roof of defendant's building; that the eave trough is so far below the eave that the water runs over it into the windows, etc.

Palmer & Schutt, for appellant. Patton & Hamilton, for appellee.

MAGRUDER, J. (after stating the facts). Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit." The question presented is whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of this suit. The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. "Damages," D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's Mayne, Dam. § 103; Birchard v. Booth, 4 Wis. 67; Slater v. Rink, 18 Ill. 527; Fetter v. Beale, 1 Salk. 11; Howell v. Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict, (Com. Dig. 363, tit. "Damages," D;) and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. McConnel v. Kibbe, 29 Ill. 483, and 33 Ill. 175; Railroad Co. v. Moffitt, 75 Ill. 524; Railroad Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. Id. p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedg. Dam. (8th Ed.) § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. Id. § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. 1 Suth. Dam. 199–202; 3 Suth. Dam. 369–399; 1 Sedg. Dam. (8th Ed.) §§ 91–94; Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536; Duryea v. Mayor, 26 Hun, 120; Blunt v. McCormick, 3 Denio, 283; Cooke v. England, 92 Am. Dec. 630, notes; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Hargreaves v. Kimberly, 26 W. Va. 787; Ottenot v. Railroad Co., 119 N. Y. 603, 23 N. E. 169; Cobb v. Smith, 38 Wis. 21; Canal Co. v. Wright, 21 N. J. Law, 469; Wells v. Northampton Co., 151 Mass. 46, 23 N. E. 724; Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365; Silsby Manuf'g Co. v. State, 104 N. Y. 562, 11 N. E. 264; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229; Town of Troy v. Railroad Co., 23 N. H. 83; Cooper v. Randall, 59 Ill. 317; Railroad Co. v. Hoag, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In Uline v. Railroad Co., supra, a railroad company raised the grade of the street in front of the plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled the court say: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? * * * There has never been in this state before this case the least doubt expressed in any judicial decision * * * that the plaintiff, in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced. In Duryea v. Mayor, supra, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewerage upon the land of another, and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action. In Blunt v. McCormick, supra, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term. In Hargreaves v. Kimberly, supra, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues." In Wells v. Northampton Co., supra, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses. Reference was made to Uline v. Railroad Co., supra, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant by prescription or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." In Aldworth v. City of Lynn, supra, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the supreme court of Massachusetts say: "The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. * * * That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner, in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages arising from the negligent and improper construction of defendant's building to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show that the eave trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in Aldworth v. City of Lynn, supra. There is a legal obligation to remove a nuisance; and the "law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." 1 Suth. Dam. 199, and notes. The question now under consideration has been before this court in Cooper v. Randall, supra. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the dust thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof or the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain storm. Nor is appellant's house or eave trough any more permanent than was the mill in the Cooper Case. In Railroad Co. v. Hoag, supra, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms which occurred after the suit was commenced. We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedg. Dam. (8th Ed.) § 93. It follows from the foregoing observations that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given. The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court.

Judgment reversed.

ULINE v. NEW YORK CENT. & H. R. R. CO.

(4 N. E. 536, 101 N. Y. 98.)

Court of Appeals of New York. Jan. 19, 1886.

Matthew Hale, for appellant. A. J. Parker, for respondent.

EARL, J. Colonie street runs at right angles with and crosses Broadway, in the city of Albany, and the defendant's railroad crosses the two streets diagonally at the place of their intersection, and had crossed there for at least 40 years before the trial of this action. The plaintiff owned three houses and lots contiguous to each other, situate on the northerly side of Colonie street, and easterly of Broadway and of the railroad. The lot numbers are 85, 83, and 81, numbered in this order from Broadway. Lots 85 and 83 extend only to the northerly side of Colonie street, while lot 81 extends to the center thereof. When the railroad was originally built, the two streets were somewhat raised. About the year 1874, two additional tracks were laid upon the defendant's road where it crossed the two streets, one of which was upon the easterly side thereof, and the road-bed was raised at its intersection with Broadway from two and a half to three feet. It does not appear that either of the tracks, or any part of the road-bed, was upon any of plaintiff's land, or that she received any damage whatever from them. But, to accommodate the grade of Colonie street to the grade of the railroad, it became necessary to raise the street and sidewalks thereof, and the consequence was that the street and sidewalk in front of plaintiff's lots were elevated about one foot, and all the damage of which plaintiff complains was caused by this elevation. She alleged in her complaint that her lots extended to the center of the street; that the defendant entered upon her property (meaning her property in the street), and tore up the pavement, raised the street, sidewalks, and gutters, and so shaped the street and gutters as to pour the water therefrom down over the sidewalk into the basements of her houses, by means of which her premises were made liable to be flooded with water, and had been flooded with water, and were rendered damp, unhealthy, and inconvenient of access, and her property therein had been injured, and the rental value and the value thereof greatly depreciated.

Many exceptions were taken at the trial on behalf of the defendant, which its counsel argued before us, and relied upon for a reversal of the judgment. But I shall notice those only which have reference to the rule of damages laid down by the trial judge. Upon the trial it was claimed, on behalf of the defendant, that the plaintiff could recover only such damages as she had sustained up to the commencement of the action. On the contrary, her counsel claimed that she could recover damages upon the theory that the embankment placed in the street in front of her lots was to be permanent, and that thus it was a permanent injury to her lots, and so the law was ruled by the trial judge.

A witness for the plaintiff was asked this question: "What, in your judgment, was the value of these lots 81, 83, and 85 Colonie street before the grade was raised?" This was objected to by defendant's counsel as immaterial and incompetent, and the objection was overruled, and the witness answered that each lot was worth $3,000, and was worth less after the change. Then he was asked this question: "How much would it be worth since the change in the street?" This was objected to by defendant's counsel on the grounds that it was immaterial and incompetent; that a change of market value between 1874 and that time was no evidence of damages in this action; that the question assumes that the damage was permanent; that the proper measure of damages was any injury to the rental value of the premises prior to the commencement of the suit and the cost of restoring the street to its former condition; and that there was nothing in the complaint or in the evidence which rendered material any evidence as to the market value of the property either before or after the alleged wrongful act. The trial judge ruled that he would allow the plaintiff to prove how much the rental of the property had been impaired down to the commencement of the action, and the actual injuries which the property had sustained by the flow of the water into, upon, and against it by reason of the change of the grade of the street by the defendant; and to this ruling plaintiff's counsel excepted. Subsequently, upon further argument on the next day, the judge reversed his ruling, and, among other things, said: "Yesterday an inquiry was made of counsel as to the act of the defendant in constructing the additional tracks, and in raising the bed of the road. I understood it to be conceded that the act was a pure trespass; that the dumping of the ground in the street was a trespass; and that the construction of the tracks was a trespass, and the running of the cars was a trespass,—and I therefore held that no court would be justified in assuming that an act of that character would be permanent; therefore that the permanent depreciation in value of the property could not be the basis of the damages, but only the depreciated rental during the time of the continuance of the trespass up to the time of the beginning of the suit, and the actual injury which the flooding had done to the property. I think, if these facts be conceded, that the plaintiff can only recover the rental which she had lost, and the actual injury to the premises down to the time of the bringing of the suit." He then called attention to the complaint, and said that it did not charge that the defendant's acts were illegal, or that they were a pure trespass upon the street, and that the pleadings showed that the acts were legally done by the defendant under its charter; and, further: "If that proposition be sound, how can the court act upon an assumption that here was a mere trespass committed by the railroad company upon a street which they had no right to do? My decision yesterday rested upon an assumption that, purely and simply, here was a trespass committed upon the street which the company had no right to commit, and which, because a trespass, the court could not assume would be of a permanent character. Upon that supposition, and upon that theory, it was held that the plaintiff could not recover as for a permanent injury to the property, but must be limited in her recovery to the damages which she had sustained by a loss of rental up to the time of bringing the action, and to the actual injury done to the property."

Plaintiff's counsel stated that "they had never claimed this was a case of mere trespass; that, as to two of the lots, they did not own the soil in the street, and it could not be a trespass." The trial judge then held that, because the acts of the defendant in the street were not illegal or unlawful, and therefore not a trespass, they might be regarded as of a permanent nature, and that the plaintiff could therefore recover for the permanent injury done to her property; and he overruled defendant's objection to the question; and the witness answered that each lot, immediately after the change, was worth about $1,500. Similar questions put by plaintiff's counsel to other witnesses were objected to by defendant's counsel. The objections were overruled, and the witnesses answered in substantially the same manner. Evidence offered by the defendant to show how much it would cost to restore the street to its former condition was, on the objection of the plaintiff, excluded.

At the close of all the evidence defendant's counsel moved for a nonsuit upon the following grounds: "(1) That no title has been proved in plaintiff in the property in question; (2) there is no proof of any interference by defendant with property in question; (3) plaintiff has failed to make out a cause of action; and upon the further ground there is no proof of any unlawful or illegal interference by defendant with the property in question." The trial judge said: "I agree with you; there is no proof of any illegal interference. That involves another very grave question,—I concede that;" and he denied the motion, and defendant's counsel excepted. The judge charged the jury that the plaintiff could recover, for the permanent injury to her property, the diminished market value thereof. He was requested by defendant's counsel to charge as follows: "If the jury believe that the act of the defendant in raising the street was not unlawful, but was by the permission of the city of Albany, then the defendant is not, under the proof, liable to plaintiff for any injury done to the plaintiff by reason of such grade." The judge replied: "I decline to charge that. I admit that involves a very difficult problem of law." Defendant's counsel also asked him to charge: "If the jury believe such acts were done without the permission of the city, and were unlawful, then the measure of damages would be the actual injury sustained by plaintiff before the commencement of this action, including the loss of rent and the injury to the use and enjoyment of the property before the commencement of the action, if any." And the judge said: "I decline to charge that, because there is no proof one way or the other upon the question. Whether there was an authorized or unauthorized act, there is no presumption in favor of the trespass."

Defendant's counsel further asked the judge to charge "that upon the evidence the jury will not be justified in rendering a verdict for the supposed difference in market value in the premises before and after the act in question," and he refused so to charge; and to all the refusals defendant's counsel excepted. The judge then said: "For the purpose of presenting that question sharply, I neglected to charge, as I shall do now, that the plaintiff can recover the difference in the rental value of the property, provided you find that the act of the defendant has impaired the market value, and to the extent it has impaired it;" and to this defendant's counsel also excepted.

At the general term the rule of damages laid down by the trial judge was approved, for the reasons given by him, to-wit: That the raising of the street was not illegal or unlawful, and was apparently permanent. Judge Boardman, writing an opinion in which Judge Bockes concurred, among other things, said: "The right of the defendant to occupy the street must be presumed from the length of time it has used it." "We cannot say that plaintiff had any title to the street, or that the occupation of the street by the defendant was unlawful." Judge Learned concurred in the result, apparently with some hesitation. He said that, in regard to the question of damages, he thought the matter did not depend altogether "on the permanency of the structure"; that if A. trespasses on the land of B., and erects a structure, however permanent, he supposed that in action for trespass damages could be recovered only for injuries up to the time of the commencement of the action; and that, if the trespass were continued, another action could be brought. But he seemed to be of opinion that, as the railroad company could legally acquire property needed for its track, and a right to construct its road upon a street, when they have taken possession, and have in fact used a street in a manner indicating a permanent use, it is not unreasonable that in an action against them damages should be recovered for the whole injury.

I have thus carefully and fully stated these facts to show the precise theory upon which the damages were recovered at the trial term, and the judgment was affirmed at the general term; and that the theory is fundamentally and radically erroneous, I can have no doubt. Railroads are authorized to be built by law; but, before a proposed railroad can be lawfully built, its builders must obtain the right of way. They cannot take private property for that purpose without first making compensation therefor, and if they do they become trespassers. If the railroad be built upon or over a highway, the public right or license must be obtained not only, but, so far as individuals own private rights or interests in the highway, or the soil thereof, they must also be lawfully acquired; and it is equally true, whether the railroad be built upon a highway, or be built elsewhere without acquiring the private right or property, that the builders are liable for all the damages suffered by the owners of such rights and property. As to them and their rights, the railroad is unlawful,—a continuing nuisance which they can cause to be abated,—and so it has been settled by repeated decisions. Williams v. Railroad Co., 16 N. Y. 97; Mahon v. Railroad Co., 24 N. Y. 658; Plate v. Railroad Co., 37 N. Y. 472; Henderson v. Railroad Co., 78 N. Y. 423; Story v. Railroad Co., 90 N. Y. 122; Mahady v. Railroad Co., 91 N. Y. 148. But wherever a railroad is lawfully built, with proper care and skill, there it is not a nuisance. What the law sanctions and authorizes is not a nuisance, although it may cause damages to individual rights and private property. If a railroad be built upon a highway after acquiring the public right, and the private property, if any, in the street, or the soil thereof, then the owners thereof are not responsible for any damages necessarily resulting from the construction or operation of the railroad to private property adjacent or near to the road; and, so, too, the law has been settled in this state by many decisions. Radcliff's Ex'rs v. Mayor, etc., 4 N. Y. 195; Davis v. Mayor, etc., 14 N. Y. 506; Bellinger v. Railroad Co., 23 N. Y. 42; Kellinger v. Railroad Co., 50 N. Y. 206. The case of Fletcher v. Railroad Co., 25 Wend. 462, so far as it holds a contrary doctrine, has been overruled by the cases just cited.

Here there was no complaint that the work done by the defendant in the street was not done with sufficient care and skill, and it was assumed at the trial that it was legally and lawfully done, and that the defendant was not a trespasser in the street. That assumption implies that the defendant had the public license to do what it did not only, but also that it invaded no property rights of the plaintiff in the street. The assumption was warranted by the facts. This railroad company in a populous city had been there a large number of years, and it cannot be assumed that it was there without right, and there is no allegation in the complaint that it was. There was no proof that the railroad embankment was made any wider on the easterly side, towards the plaintiff's lots, and hence it may be assumed that the additional track was laid upon its embankment and under rights early acquired and long possessed by it at that place. As before stated, there is no proof that either the railroad tracks, or any part of the railroad embankment, was placed upon the soil of the plaintiff in the street, and in fact neither was. Even if the plaintiff's lots were bounded southerly by the center of Colonie street, all the defendant did was to raise the street and sidewalk in front of her lots so as to conform the grade of the street to the grade of the railroad and of Broadway, over which it passed. This, we must assume, it had from the city the right to do, and so much it was bound by law to do under the general railroad act (Laws 1850, c. 140, § 28, subd. 5), by which it was bound to restore the street to "such state as not unnecessarily to have impaired its usefulness." Here there was no allegation nor proof that the street, as a street for travel, was in any way injured, and much less that its usefulness was unnecessarily impaired. It was not, in front of plaintiff's premises, by the act of the defendant, devoted to anything but street purposes; and, as the city could have raised the grade of the street without liability to abutting owners, so it could authorize the defendant to do so without such liability.

We have a case, then, where the defendant did acts in the street entirely lawful, and where it was held liable for the consequential damages to the plaintiff's adjacent property caused by the careful use of its lawful authority and the proper exercise of its legal rights. To uphold this recovery upon such a theory would subvert a very important rule of law about which there has been no substantial question in this state for at least 30 years. The rule was recognized by all the judges who wrote opinions in Story v. Railroad Co., and by the judge who wrote in Mahady v. Railroad Co., the latest cases in which the rule has been under consideration here. Even if the assumption that the acts done by the defendant in Colonie street were lawful was not warranted by the facts, yet, as the lawfulness of the acts was assumed by the court, and substantially conceded by plaintiff's counsel at the trial, the assumption should prevail here, because but for it the defendant might have proved that its acts were lawful.

But the learned counsel for the plaintiff, as we understand his brief, does not attempt to sustain this judgment upon the theory adopted by the trial judge. He claims that the interference by the defendant with the street was unlawful and a nuisance, and that, therefore, the plaintiff was entitled to recover damages caused thereby; and if he is right in his contention that this embankment placed in the street by the defendant was unlawful, and therefore a nuisance, then the plaintiff was entitled to recover damages. The question, however, still remains, what damages? All her damages, upon the assumption that the nuisance was to be permanent? or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied, and which ought to be well known and thoroughly settled. There never has been in this state, before this case, the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be, by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere. In Hambleton v. Veere, 2 Saund. 170, the learned annotator in his note says: "So, in trespass and in tort, new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."

In Rosewell v. Prior, 2 Salk. 460, the plaintiff being seized of an ancient house and lights, defendant erected a building whereby plaintiff's lights were estopped. There was a former recovery for the erection, and the second action was for the continuance of the erection; and it was held that the former recovery was not a bar. In Bowyer v. Cook, 4 Man. G. & S. 236, there had been an action of trespass for placing stumps and stakes on plaintiff's land, and the defendant paid into court in that action 40 shillings, which the plaintiff took in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice that unless he removed the stumps and stakes a further action would be brought against him; and in the second action it was held that the leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to recover. In Holmes v. Wilson, 10 Adol. & E. 503, the action was trespass against a turnpike company for continuing buttresses on plaintiff's land to support its road. Plaintiff had recovered compensation for the erection of the buttresses in a former action, and the money had been paid into court, and received by him; and it was held that after notice to defendant to remove the buttresses, and a refusal to do so, plaintiff might bring another action for trespass against the company for keeping and continuing the buttresses on the land, and that the former recovery was not a bar to such an action. In that case it was argued for the defendant that the damages given in the first action were to be regarded as a full compensation for all injuries occasioned by the buttresses, and were to be considered as the full estimated value of the land permanently occupied by the buttresses; that the damages were in respect of prospective as well as past injury, and that the judgment operated as a purchase of the land. Patterson, J., said, in reply to the argument: "How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it." And it was argued by learned counsel for the plaintiff, in reply to the argument that the former judgment operated as a purchase of the land: "As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be that a person who wants his neighbor's land might always buy it against his will, paying only such purchase money as a jury might assess for damages up to the time of the action. If the property was changed, when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by defendant's buttresses, would the recovery of damages in trespass be a defense? There is no case to show that when land is vested in a party and fresh injuries are done upon it, fresh actions will not lie." See, also, Thompson v. Gibson, 7 Mees. & W. 456; Mitchell v. Colliery Co., 14 Q. B. Div. 125; Whitehouse v. Fellows, 10 C. B. (N. S.) 765.

I find no case in England now regarded as authority in conflict with these cases. The case of Beckett v. Railroad Co., L. R. 3 C. P. 81, does not lay down a different rule. That case arose under the railroad clauses consolidation act and the land clauses consolidation act, which require full compensation to be made by railroad companies, not only for lands taken, but also for damages to land injuriously affected. Under those acts the plaintiff recovered, not only the value of his lands taken, but for permanent injury to his other lands. The case of Lamb v. Walker, 3 Q. B. Div. 389, was overruled in Mitchell v. Colliery Co., supra, and is no longer authority in England.

The same rule of damages which I am trying to enforce prevails generally, and with very rare exceptions, in the other states of this Union. In Esty v. Baker, 48 Me. 495, Appleton, J., said: "The mere continuance of a building upon another's land, even after the recovery of damages for its erection, is a trespass for which an action will lie." In Russell v. Brown, 63 Me. 203, the action was trespass quare clausum, for continuing upon the plaintiff's land the wall of a building 9 inches wide, and 106 feet long. The defendant pleaded in bar a former judgment recovered for building the wall, and satisfaction, and it was held that the mere continuance of a structure tortiously erected upon another's land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass quare clausum will lie, and that a recovery with satisfaction for erecting a structure does not operate as a purchase of the right to continue such erection. In Canal Corp. v. Hitchings, 65 Me. 140, the action was trespass for filling about 200 yards of canal, and the justice instructed the jury, inter alia: "Whatever diminution there is in the value of the property by reason of the trespass is an element of damage." The defendant excepted to this instruction, and it was held erroneous; that the recovery should have been limited to such damages as were sustained down to the commencement of the action. Wilton, J., writing the opinion, said: "It is now perfectly well settled that one who creates a nuisance upon another's land is under a legal obligation to remove it, and successive actions may be maintained until he is compelled to do so." "The doctrine of all the cases is that a recovery of damages for the erection of a building or other structure upon another's land does not operate as a purchase of the right to have it remain there; and that successive actions may be brought for its continuance until the wrongdoer is compelled to remove it." "As a necessary result of this doctrine, it has been held, and we think correctly, that in the first action brought for such a trespass the plaintiff can recover such damages only as he had sustained at the time when the suit was commenced, because, for any damage afterwards sustained, a new action may be maintained; and the law will not allow two recoveries for the same injury." "The injury complained of was the filling up of the canal. The defendant, acting under authority from the city of Portland, had extended Commercial street over and across the canal, by means of a solid embankment. No opening was left for the passage of either boats or water. Assuming that this embankment was unlawfully placed there; that the canal should have been bridged, not filled up,—and we have a nuisance upon the plaintiff's land,—something placed there which can, and in contemplation of law ought to be, removed. For such an injury successive actions may be maintained until a removal is compelled. The damages must therefore be limited to such as the plaintiff has sustained at the date of the writ. The rule given to the jury,—namely, that the measure of damages was the diminution of the value of the property,—was inappropriate, and must have led to an erroneous result."

In Bare v. Hoffman, 79 Pa. St. 71, the plaintiff had a dam from which he conducted water to his tannery, and the defendant made a dam below, into which the surplus water over plaintiff's dam flowed, and from his dam the defendant, by a pipe, conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry the offal from his tannery, and it was held that evidence of permanent injury to the market value of plaintiff's tannery was inadmissible; that the injury was not of such a character as to assume that it would be permanent, and to assess damages accordingly; and that, as a general rule, successive actions may be brought so long as the obstruction is continued. Mercur, J., writing the opinion, said: "The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction."

In Thompson v. Canal Co., 17 N. J. Law, 480, it was held that the title to lands does not pass, by a verdict for the plaintiff, in an action of trespass; that it remains in the plaintiff, and therefore a verdict for damages to the full value of the land is manifestly wrong. In Thayer v. Brooks, 17 Ohio, 489, the action was case for nuisance in diverting water from the mill of the plaintiff. The injury complained of in the declaration was that the mill was rendered less useful by reason of a diversion of a portion of the water from the stream by means of a canal cut by defendant. The court instructed the jury that the owner of the mill was entitled to recover such damages as the jury believed he had sustained by the mill-site having been diminished in value in consequence of the diversion of the water. Birchard, C. J., writing the opinion, said: "This was going too far. Suppose the party liable at all, he was only liable, under any form of declaration, for the damages actually sustained prior to the commencement of the suit." In Railroad Co. v. Kernodle, 54 Ind. 314, it was held that where a railroad company in the construction of its road-bed, without taking the steps prescribed by law to condemn its right of way, unlawfully enters upon and takes possession of land, and suit is brought by the owner thereof to recover damages for such trespass, the damages assessed should include compensation for the injury inflicted, and such punitive damages as are authorized by law, but not the value of the land so used or appropriated; that in such an action no judgment that the court trying such cause is authorized to render, will give the railroad company a title to the land appropriated. In Harrington v. Railroad Co., 17 Minn. 215 (Gil. 188), where the defendant had built its road in the street adjoining plaintiff's land, it was held that it was a continuing nuisance for which successive actions could be brought; and an equitable action for an injunction was sustained for the reason that it would obviate the necessity of a multiplicity of suits. In Adams v. Railroad Co., 18 Minn 260 (Gil. 236), the plaintiff was the owner and in possession of a lot situated on the side of the street, which also extended to the center of the street, subject only to a public easement to use the same for street purposes. The defendant, a railroad company, without first acquiring the right so to do, constructed its road along the street in front of plaintiff's premises; and it was held that the defendant, in thus appropriating the street to its own use, was a trespasser, and that its acts constituted a private nuisance as against the plaintiff, entitling him to maintain an action therefor, and that the damages would be for the unlawful withholding of the possession of the premises up to the commencement of the action. Ripley, C. J., writing the opinion, said: "As there is no presumption of law that such illegal running of trains and other trespasses will be continued in the future,—that the unlawful act of to-day will be repeated on the morrow,—it is, of course, obvious that while the jury, in the present case, could assess past damages, they could not assess the permanent damages to accrue from an assumed continued use thereafter of the land by the defendant in the same way."

In Ford v. Railroad Co., 14 Wis. 663, the owner of lots abutting on a street in a city brought an action against a railroad company to recover damages caused by the construction of its road-bed through the street in front of his lots, and for an injunction restraining the defendant from laying down its rails in front of his property. Dixon, C. J., in writing the opinion, said: "It seems that the past damages, or those occasioned by the trespass, might have been assessed by the court, or the judge might have ordered a jury for that purpose; but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute."

In Carl v. Railroad Co., 46 Wis. 625, 1 N. W. 295, the complaint alleged that plaintiff owned in 1869, and continued to own until 1873, a city lot, with a dwelling-house thereon; that in 1869 defendant constructed its road, with embankment and ditches, along and on each side of the center of the street, in front of the lot, and maintained the same to the commencement of the action, and thereby obstructed access to the house and lot, and diminished their value; that by reason of the premises plaintiff, before the commencement of the action, was compelled to sell and did sell his property for a sum less by $1,000 than could otherwise have been procured for it, and that defendant had refused on demand to make compensation for the injuries so sustained, and had taken no steps under its charter to have the damages ascertained, and judgment was asked for the sum of $1,000; and it was held that the action must be treated as one for damages for a continuing trespass, and that the complaint stated facts sufficient to sustain such an action; that the plaintiff in such an action, however, can recover nothing more than the damages to the property resulting from the trespass between the building of the road and the commencement of the action; that such a recovery would be no bar to a future recovery by plaintiff or his grantee for subsequent damages to the property by a continued maintenance of the road; and that evidence of the permanent depreciation in the value of the land resulting from such road was inadmissible. The judge writing the opinion said: "The recovery in the present action will be a bar only as to damages sustained previous to the commencement of the same, and the plaintiff or her grantees can recover in another action for any injury caused to the lot by the maintenance of such railroad subsequent to the commencement of this action."

In Blesch v. Railroad Co., 43 Wis. 183, it was held that the rule of damages in such a case as that, is the difference in value of the use of the lot, without the railroad track and with the railroad track, between the date of building the same and the commencement of the action. Justice Cole, in delivering the opinion, said: "The damages recoverable in the action are, of course, for the past injury to the freehold and possession; that is, the pecuniary loss which the trespass had caused the plaintiff in the use and enjoyment of his property when the suit was commenced." And, further: "One reason why a railroad company can be charged with the permanent damages for taking land for its use only in a proceeding under the statute for asserting the right of eminent domain, is that, when such damages are paid, the company is entitled to have a clear title to the property so taken, and such title cannot be acquired in an action for a trespass or nuisance. Another reason is that, in the action to recover damages for the nuisance, the plaintiff may have judgment to abate the nuisance, and it would be clearly unjust that the plaintiff should recover damages for a continuance of the nuisance, and at the same time have judgment to abate and remove the same." See, also, Canal Co. v. Bourquin, 51 Ga. 379.

In harmony with these authorities are the views of approved text writers. 3 Bl. Comm. 220; Sedg. Meas. Dam. 155; Mayne, Dam. (1st Am. Ed.) §§ 110, 111; 1 Suth. Dam. 199, 202, 369, 399. While the authorities in other states are not entirely harmonious, those which I have cited give the general drift of the decisions.

But whatever difference there may be in other states as to the rule of damages under consideration, in this state there is none whatever. Here the authorities are entirely uniform, that in such an action as this damages can be recovered only up to the commencement of the action, and that the remedy of the plaintiff is by successive actions for his damages until the nuisance shall be abated. The law was so announced in Green v. Railroad Co., 65 How. Prac. 154; Taylor v. Railway Co., 50 N. Y. Super. Ct. 312; Duryea v. Mayor, etc., 26 Hun, 120,—all cases entirely analogous to this. In McKeon v. See, 4 Rob. 449, it was held that the only damages which the plaintiff is entitled to recover in an action against an adjoining owner for a nuisance upon the premises of the latter are those for a depreciation of the rent and loss of tenants caused by such nuisance previous to the commencement of the action. In Whitmore v. Bischoff, 5 Hun, 176, it was held that the damages which a party can recover for a private nuisance are those which he has sustained previous to the bringing of the action, and that it is error to allow a recovery for the diminution in value of the premises based upon the assumption that the nuisance is to continue forever. In Duryea v. Mayor, etc., 26 Hun, 120, the action was brought to recover the damages occasioned by the wrongful act of one who had discharged water and sewage upon the land of another, and it was held that no recovery could be had for damages occasioned by discharge of water and sewage upon the land after the commencement of the action. In Blunt v. McCormick, 3 Denio, 283, the action was case for damages in consequence of the erection of a building adjoining plaintiff's, whereby plaintiff's light was obstructed. The plaintiff was defendant's tenant. The court at the trial charged the jury that if the plaintiff was entitled to recover they should give damages for the injury which he would suffer during the whole of his term. It was held that this charge was erroneous, and that a recovery could be had only for such damages as had occurred at the time the suit was commenced, and not for the whole term. In Plate v. Railroad Co., 37 N. Y. 473, the action was brought to recover damages caused by keeping and maintaining the defendant's railroad track, and ditches along the side thereof, in such manner as to cause the water to flow back upon the plaintiff's land. There had been a former recovery of damages for the same cause, which was alleged as a bar to the second action; but it was held not to be a bar. The judge writing the opinion said: "If, indeed, he could have recovered damages, not only for all injuries which had occurred previous to the commencement of the action, but also for all injuries which may possibly thereafter occur, the first recovery would be a bar to the second."

In Williams v. Railroad Co., 16 N. Y. 97, and Story v. Railroad Co., 6 N. Y. 85, a resort to equity was allowed because the necessity of bringing successive actions to recover damages would thus be obviated. If, in those cases, the plaintiffs could have recovered all their damages, past and prospective, in actions at law, equitable actions would have been unnecessary and unauthorized. The case of Mahon v. Railroad Co., 24 N. Y. 658, is a precise authority; and, if there were no other, ought to control the decision of this case. In that case the railroad company constructed its road and laid its tracks upon a highway in front of Mahon's premises. His title to the adjoining premises extended to the center of the street, and in 1842 he commenced an action against the railroad company to recover damages in consequence of the construction and operation of the railroad in the highway in front of his premises, and he recovered a judgment. Afterwards he died, and then his executors instituted an action to recover damages sustained, during the lifetime of the testator, subsequently to the former recovery, for a continuance of the railroad and its continued operation in the street; and to the last action the defendant interposed as a defense the former recovery, and it was held not to be a bar. As disclosed by the printed papers to be found in the state library, the declaration in the first action contains four counts. In the first and fourth, among other things, it was alleged that the plaintiff lawfully owned and possessed a lot, and dwelling-house thereon, and that the defendant caused to be wrongfully constructed an embankment of earth of the height of five feet in front of his premises, and wrongfully continued and maintained the same, and operated its railroad thereon, by means whereof he could not have and enjoy his free and unobstructed passage into and upon his lands and to and from his dwelling-house, and his lot and dwelling-house were flooded with water, and rendered damp, and his buildings and property were greatly injured and depreciated in value. It is thus seen that the character of the injuries complained of in that action were like those complained of here, and that a depreciation in the value of the property was claimed. If the complaint here is broad enough to recover for permanent diminution of the value of the property, upon the theory that the nuisance was to be permanent, so the declaration there was broad enough to recover damages upon the same theory; and if the facts of this case are sufficient to justify and uphold a recovery for permanent injury and diminution in value of the property, so, clearly, were the facts of that case. In the argument before this court of the second case, which is above cited, it was claimed that the declaration in the first suit was broad enough to embrace the damages which Mahon's property sustained by the construction of the railroad, through all time, and that, whether it was or not, the result should be the same, as the damages resulting from the construction of the railroad were incapable of being split up and made the subject of an infinite number of actions; and that the true rule in such a case was that the plaintiff was at liberty to prove, and the jury were bound to consider, what damages might probably be the result of the act complained of, and the finding in one case must embrace all the damages. On the other hand, it was claimed that the plaintiff in that suit could have recovered damages legally only up to the commencement of the suit. The court at the trial of the second action held that the former recovery was a bar, and upon that ground nonsuited the plaintiffs. They then appealed to the general term, where the prevailing opinion for affirmance was written by Judge Allen. He held that the former recovery was a bar; but stated in his opinion that "if the wrong complained of had been a technical nuisance, in the legal sense of the term, a recovery for damages for the erection would not bar an action for the continuance;" that "every day's continuance would be a legal wrong, for which an action would lie;" that "a right cannot exist to continue a nuisance, and every party affected by it may insist upon its removal, and the neglect to comply with the duty resting upon a party to abate a nuisance which he has either erected or maintained gives an action to any party injured by the neglect." But he held that the railroad was not to be treated as a nuisance, and that the company had permanently appropriated the highway to its use, and therefore permanent damages could be recovered; and his opinion, if sound, would uphold this recovery. Judge Pratt wrote a dissenting opinion, taking an opposite view. In his opinion he said: "If the injury complained of was of that nature that he was entitled to recover prospective damages, he should have proved them in that suit. The law will not suffer a party to unnecessarily split up demands, and thus needlessly multiply suits." And, further: "The track and embankment would, under such circumstances, be a continuing nuisance, and the defendants would be liable to a new action every day so long as they kept it up, and damages would accrue to the owner. A person, by erecting a nuisance on the lands of another, or by trespassing on such lands, acquires no right thereby, and a recovery of damages for the injuries sustained does not have the effect to vest the title in the wrong-doer, as in the case of a conversion of personal property." And here the judgment was unanimously reversed. Clerke, J., writing the opinion, commenced by saying: "If the plaintiff's testator could have recovered all that he was entitled to in the first action, it is, of course, a bar to the second; and this depends chiefly, though not altogether, upon the question whether the Utica & Schenectady Railroad Company in any way transcended the authority constitutionally vested in them by the legislature. If they did, their road is a nuisance,—a perpetual nuisance,—and every day's continuance of it is a legal wrong for which they are liable in damages after they have accrued." And he held that the railroad company did transcend its authority by entering upon the highway without first causing Mahon's damages to be assessed and paid; and that the illegal appropriation of the highway made it liable to damages in successive actions as the damages accrued. And he further said: "The railroad company, therefore, having, without compensation to those entitled to the reversion of the lands, constructed, maintained, and operated their road upon the highway in question, acted and continued to act unlawfully, are liable to damages from time to time as they accrued, and on this ground the second action is maintainable." In the course of the opinion, this language is used: "If they did not transcend their authority, and yet in constructing their road have necessarily injured the rights of others, they are equally liable to respond for prospective as well as accrued damages; and in such case they cannot be vexed again in a second action."

It is not apparent precisely what was meant by this phrase. It is a mere dictum, and certainly announces an erroneous rule of law. It may be that the learned judge was misled by the doctrine apparently laid down in Fletcher v. Railroad Co., supra. The same judge, in Plate v. New York Cent. R. Co., supra, speaking of that paragraph says: "I am inclined to think there is some clerical or typographical mistake here; or, perhaps, there was some inadvertence on my part in the haste of writing;" and that it can, "at most, be considered nothing more than a dictum, and therefore cannot control the present case."

There is no authority to be found in this state holding any other rule of damages in such a case. The case of Henderson v. Railroad Co., 78 N. Y. 423, is not in conflict, as that was an equitable action; and in the opinion written in that case the rule is recognized to be otherwise in actions at law; and the case of Mahon v. Railroad Co. is expressly recognized, and it was certainly not intended to overrule or depart from it or any of the prior authorities. The judgment there was based entirely upon equitable principles, and then it was ordered that, upon payment of the sum awarded by the referee, the plaintiff should convey the title to the defendant. If the case of Mahon v. Railroad Co., supported, as it is, by abundant authority, and based upon common-law principles, which in this state have always been recognized, is to be disregarded in the decision of this case, it had better be distinctly overruled, and no longer left to lure the legal wayfarer by its false light. See, also, Schell v. Plumb, 55 N. Y. 592, 598.

The rule contended for by the plaintiff, and affirmed by the supreme court in this case, would lead to some embarrassments and to great inconvenience. The plaintiff's recovery cannot divest her of any legal rights she has in the street, either to an easement or to the soil; and if we may assume that her recovery would bar any future recovery for the precise embankment and the precise use thereof which existed at the time of the commencement of her action, yet it would not bar a recovery if there should be a change in the embankment or the use thereof. If the defendant should run a few more trains of cars, or raise its embankment, or widen it, or change it in any way, the plaintiff would be permitted to institute a new action, and to repeat her action every time there should be any change. And yet she has recovered damages in this action upon substantially the same theory damages would have been awarded if there had been an appraisement under the statute which vested title in the defendant. If the rule affirmed be the correct one, then a railroad company authorized to construct its road may enter upon the lands of any private person, and take them, and in a suit for trespass the plaintiff must recover his entire damages, and the railroad company must become substantially vested with the title to the land; and thus, instead of conforming to the statute, it may acquire land by a pure trespass. And so the owner of land, instead of resorting to the constitutional tribunal for the appraisement of his damages, may have them appraised by an action which really vests no perfect title. Can the statute of frauds be subverted, and a perpetual easement or right in land, without a grant, be thus conveyed by mere estoppel? In this case has happened what may happen in many cases. The defendant supposed, and had the right in good faith to suppose, that it had satisfied plaintiff's damages and acquired all her property interest in the street until the verdict of the jury undeceived it; and then, if the verdict shall stand, it became obliged to pay her for perpetual damages, although they had come to an end, and to make the same compensation which it would have been required to make if it had acquired a perfect title under the statute; and yet it is left without a perfect title, liable to successive suits on the claim, to be established on the uncertain evidence of witnesses that its burden upon or interference with the street had been changed or increased. It was not left the option either to abate the alleged nuisance, or to perfect its title, in the mode prescribed by law, to any easement or interest the plaintiff might have in the street.

The law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever. The impolicy and absurdity of such an assumption is illustrated in this case, as the defendant offered to prove, and hence it may be taken as true, that since the commencement of the action it has reduced the street to its former grade. The rule laid down in the cases which I have cited, and which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad ample remedy. He may sue and recover his damages as often as he chooses,—once a year, or once in six years,—and have successive recoveries for damages. He may enjoin the operation of the railroad, and compel the abatement of the nuisance by an action in equity, and where his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment. Brown v. Galley, Hill & D. 308; Etz v. Daily, 20 Barb. 32; Redfield v. Railroad Co., 25 Barb. 54. It certainly cannot be necessary to subvert the law as it has been well established, in order to give the plaintiff ample remedy for any wrong which the defendant has done or can do her in the street in front of her premises. Nor can it be expedient to introduce into the nomenclature of the law a new action,—one to recover for the conversion of real property, to be followed by the same consequences as an action for the conversion of personal property.

As to this rule of damages, it matters not what the form of the complaint in the first action was. The plaintiff is bound to recover in his first action all the damages to which he is entitled. If he is entitled to damages for permanent injury to his property, it is not optional for him to split them up, and recover part of them in the first action, and then bring subsequent actions for the rest. If entitled to recover damages only up to the commencement of his action, no form of complaint will entitle him to recover more. In the case of Mahon v. Railroad Co. it was proved that the former recovery was for damages only to the commencement of the former action, and yet that circumstance was not deemed material.

Since writing the above, the case of City of North Vernon v. Voegler (Ind.) 2 N. E. 821, containing a very elaborate opinion, has come to our attention. I have carefully examined that case, and find that it is not authority for the plaintiff on the question now under discussion. There the city had the right to grade one of its streets, but did it so negligently as to cause damage to the adjoining lots of the plaintiff, and it was held that he could recover, and was bound to recover, all his damages in a single action. It was decided that, in the absence of negligence, there would have been no liability for consequential damages caused by what was rightfully done in the street. The judge, writing the opinion, said: "Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets when the work is done in a careful and skillful manner, but they have quite as steadily maintained that, where the work is done in a negligent and unskillful manner, the corporation is liable for injuries resulting to adjacent property."

Here there was no allegation or proof or claims of negligence or unskillfulness in the construction of the embankment in the street; and, as I have shown, it was assumed and conceded upon the trial that it was lawfully and legally constructed. The trial judge did not submit to the jury any question of negligence; but charged them, if they found against the defendant as to the release, then it was absolutely liable for plaintiff's damages, and that the only question for their consideration was the amount of the damages. Hence that case is an authority for the views I have expressed upon the first ground of error herein discussed. But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. The judge writing the opinion there is very careful to place his decision upon the ground that the structure in the street was rightful, but negligently made, and he recognized the rule, as to successive actions, to be different where the structure is wrongfully in the street, and is there a nuisance. He said: "This is not the case of a nuisance. It is the case of a negligent improvement in a street. The improvement was in itself rightful and legal, but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that a continuance of a nuisance will supply ground for an action have no influence upon this case." And hence those cases were not cited. It is clearly to be inferred that if that court had been dealing with the case of an unlawful embankment placed in the street it would have held that successive actions could be maintained. But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation, under proper authority, may erect an embankment in a street; and, if the work be carefully and skillfully done, it cannot be made liable for the consequential damages to adjacent property; but if it be carelessly and unskillfully done it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded, after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken, and foresee them long before—it may be many years before—they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued, and that the wrong-doer will not discontinue or remedy it; and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated. But, whether that case was properly decided or not, it is not in conflict with the conclusions I have reached in this case, but is in entire harmony with them. Therefore, upon both grounds considered in this case, there should be a reversal of this judgment, and a new trial.

All concur, except DANFORTH, J., who reads dissenting opinion, and MILLER, J., not voting.

DANFORTH, J. (dissenting). The action was commenced November 5, 1878. Upon the first trial the plaintiff had a verdict, which upon appeal was set aside. Upon the second the jury disagreed. Upon the third and last she again succeeded, and the result has been approved by the general term. It is now objected by the defendant that the trial court erred (1) in its rulings on the question of damages; (2) in regard to evidence; (3) in its charge to the jury,—and hence the case should go back again for another trial.

The plaintiff alleged and proved that she owned and occupied, in person and by tenants, certain improved lots of land lying on the northerly side of Colonie street, and extending to its center; that between the houses on those lots and the traveled roadway was a sidewalk; and, by her complaint, alleged that the defendant entered upon the property, and tore up the pavement in Colonie street in front of the houses, raised the street higher than it was before, and also the street west of said premises and between said houses and the west side of Broadway, and tore up and raised the sidewalks in front of her houses, and raised and filled up the gutter in front of them, and so shaped the street and gutters as to pour the water therefrom down over said sidewalk and into the basements of said houses, by reason of which the premises are made liable to be flooded with water, and have been at different times flooded with mud, filth, and water, and the property therein injured, and the said premises rendered damp and unhealthy, and by which the rental value of said houses was greatly depreciated; and also that the shape given to the surface of said street by the defendant is such as to make the approach to said houses inconvenient and unsafe, and to interfere with the use of the same, and depreciate its value, and that said street is made so steep in its decline on the north side that wagons cannot safely or conveniently stand in front of said premises of said plaintiff; and asked for damages sustained by reason of these acts. The evidence fairly tended to establish the truth of these averments, and showed that the acts complained of were done by the defendant in widening and raising its road-bed and making additional tracks. In doing this they raised the carriage-way of the street from two to three feet, making it higher than the sidewalks. Evidence was received, against the objection of the defendant, to show a depreciation, caused by these changes, in the market value of the houses and lots, and afterwards witnesses were called by the defendant to speak upon the same subject. The question was fairly litigated. The defendant did not claim that damages did not result from its acts, but insisted that "the proper measure of damages should be any injury to the rental value prior to the commencement of the suit, and the cost of restoring the street to its former condition; that there is nothing in the complaint or in the evidence which renders material any evidence as to the market value of the property, either before or after the alleged wrongful act;" but the court held that there was nothing in "the case to show that the alteration in the street, and construction of tracks, was for a temporary purpose, or a mere trespass; but, on the contrary, appeared to be of a permanent kind and character, and the complaint sufficient." The case was submitted to the jury, in a way not excepted to, to say upon the evidence whether there had in truth been a depreciation of the property arising from the acts of the defendant in and upon the street; but, being asked by the defendant's counsel to charge "that under the evidence the jury will not be justified in rendering a verdict for the supposed difference in market value in the premises before and after the act in question," the judge refused to do so, and added: "For the purpose of presenting that question sharply, I charge that the plaintiff can recover the difference in the market value of the property, provided you find that the act of the defendant has impaired the market value, and to the extent it has impaired it." Defendant's counsel excepted. The defendant asked the court to charge: "If the jury believe such acts were done without the permission of the city, and were unlawful, then the measure of damages would be the actual injury sustained by plaintiff before the commencement of this action, including the loss of rent and the injury to the use and enjoyment of the property before the commencement of this action, if any." The court declined to charge that, saying: "There is no proof one way or the other upon that question. Whether this was an authorized or an unauthorized act, there is no presumption in favor of the trespass." Defendant's counsel excepted.

Upon this branch of the case the defendant is without merit, unless it is liable to be again vexed for the same cause. It took possession of the plaintiff's property without permission, and is called upon to pay so much only as will make good her loss,—no more than she would have been entitled to had the defendant made her an involuntary vendor under compulsory proceedings, by which the same result would have been reached. In such a case astuteness would be misapplied, when the only purpose is to obtain a new trial, to be followed, as is conceded, by a verdict for some amount, and, after that, statutory proceedings to acquire title in deference to the law (Laws 1847, c. 272; Laws 1850, c. 140, § 21, amended by Laws 1869, c. 237, § 1) which provides for a case where a railroad company shall not have acquired a valid and sufficient title to any land upon which they shall have constructed their track. Under these statutes application might be made to the court by petition, and compensation for the land determined by a jury. It is true, these are not the proceedings before us, but the same thing has been accomplished.

The defendants were without title. They have constructed their tracks, and the compensation to be made has been determined by a jury. In some way, it cannot be doubted that the plaintiff is entitled to damages or compensation upon the scale applied by the trial court. Of course, the defendant should not be liable to enlarged compensation, nor to a double payment. Here there is no unusual compensation. It is measured by the amount for which the property would be depreciated in market value by the change of roadway to accommodate the new tracks and structure which the defendant placed upon the street. This represents merely the plaintiff's actual loss and damage, and its payment should protect the defendant from further action. I think it will. Where the wrong consists of a single act of destruction, the cause of action is complete, and the party injured must have full compensation in the first suit, not only for the act, but for all the consequences which could arise from it. Clegg v. Dearden, 12 Q. B. 576.

The statutes referred to, allowing the assessment of compensation where the railroad company has without right placed its tracks upon the land of another, in terms apply to any such case, and go upon the assumption that the appropriation of the use of the land, and the structure placed upon it, are permanent; and such is its nature. It is for the purposes of its incorporation; public policy requires that it should remain, and although in the first instance without right, yet, after compensation has been determined and paid, the company become possessed of such land during the continuance of the corporation. Laws 1847, c. 404, § 3.

This principle was applied in the Henderson Case, 78 N. Y. 423, where, in behalf of the defendant, it was argued, as it is here, that the defendant's acts amounted simply to a series of trespasses which might be the subject of fresh actions,—a new one every day. The defense did not prevail, and unless a distinction favorable to the defendant can be drawn from the fact that this is an action at law, and that a suit in equity, it is decisive here. In that case full compensation was awarded upon conditions which, when complied with, protected the defendant in the enjoyment of the property trespassed upon. In this case the same result follows. The complaint charges, as the result of the defendant's acts, depreciation of the value of the property,—in substance, diminution of its market value. That suggested the proper inquiry, and would be the proper measure of compensation in any proceeding to acquire title or fix compensation for an unwilling vendor. The evidence was directed to that end. The charge of the judge gave that question to the jury as the only one which, when answered, was to determine the amount of damages. The complaint shows, indeed, as consequent upon defendant's act, not only that water has been directed into the basements of the houses, but that they are thereby "made liable to be flooded"; and as consequent upon that and other effects, depreciated in value. That was the subject of the action. The other things were simply its ingredients, not independent or of themselves causes of action, but mere effects of the act complained of, resulting in diminution of value to the property, for which alone damages were demanded and given. The record shows these things, and that the adjudication covered all damages prospective as well as past that might be sustained by the plaintiff by reason of the act of the defendant.

The appellant cites various cases in support of a contrary view; but I think them inapplicable. So far as those from the courts of this state are concerned, they relate to acts which obviously were or might be of a temporary and not permanent character. The Mahon Case, 24 N. Y. 658, was of the former class. It was considered in the Henderson Case, supra, and thought to be no obstacle in the way of allowing complete and final damages where the act causing injury was necessarily permanent. In other states the courts differ. The appellant cites the Carl Case, 46 Wis. 625, 1 N. W. 295; but on the other hand are Town of Troy v. Cheshire R. Co., 23 N. H. 83, quoted in the Henderson Case, supra, 435; Powers v. City of Council Bluffs, 45 Iowa, 652; Railroad v. Grabill, 50 Ill. 241. Still others are cited by the respondent. It cannot be necessary to refer to them.

The concession of the appellant is, in substance, that the correct measure of damages was adopted, provided the defendant is secure against further interference by the plaintiff, as it was in Henderson's Case, supra. The struggle, then, is over the form of the action. There is little in it. The defendant has, and will have during its corporate life, the enjoyment of the premises, and the plaintiff will have been paid for its surrender. Nothing more could have been secured by either, whether by statutory proceedings or by suit in equity.

The next question arises on the new matter set up by the defendant as a defense, viz., that one Sarah Wallace, the plaintiff's mother, was in possession of the premises, claiming to be owner at the time of the act complained of, and that she agreed with the defendant to receive $500, in full settlement therefor, and for a general release, and that this sum was in fact paid to her on the thirtieth of September, 1875, in the presence of one De Pfuhl; and alleged that, in executing it, Mrs. Wallace acted in behalf and by the authority of the plaintiff. These things were controverted. The name of Mrs. Wallace was alleged to be a forgery, and that no money was received by her, and whether it was or not was made the important question upon the trial. Among other things, the defendant gave in evidence a check made by it on the Chemical Bank for $500 payable "to the order of Sarah Wallace." This purported to be indorsed "S. Wallace," then by De Pfuhl as second indorser, and after him by Wendell, cashier, to the Fourth National Bank of New York, or order. There was no direct evidence either that Mrs. Wallace signed the receipt, or indorsed or received the check. De Pfuhl was a lawyer by profession, and, at the times in question, in the employ of the defendant, "in the law, real-estate, and claim department." His testimony was taken in 1880, but his recollection of the events was slight and imperfect. He said he had many interviews with Mrs. Wallace on the subject of settlement, but could recall nothing said "by her, by himself, or any one else." He had no recollection of seeing Mrs. Wallace sign the receipt, but had no doubt the signature to it of his name as witness was genuine, adding: "I have no recollection of seeing Sarah Wallace sign that paper, but I have no doubt that she did, from the fact of my witnessing her signature. The body of the paper is in my own handwriting. I cannot remember anything about the drawing or execution of this paper." Being shown the check, he said: "I believe the name 'Francis De Pfuhl,' on the back of this check, is in my handwriting. I have no doubt that Mrs. Sarah Wallace wrote the name 'S. Wallace' on the back of this check. I have no recollection about this check being cashed at any bank in the city of Albany. I do not know who had the money on said check. I have no recollection of anything further in regard to said check."

Witnesses for plaintiff, qualified to speak, discredited the genuineness of the signature purporting to be that of Mrs. Wallace. The plaintiff testified that she went with her mother a number of times to the defendant's office about the damage, and always when her mother went she, "so far as she knew," was with her; shows an offer of $500, and its rejection, and other circumstances indicating efforts to compromise, but failure to do so; and that she first heard it claimed that any money had been paid when it was set up by the defendant's answer. In 1875 her mother was 65 years old, and they lived together during her life. She kept bank-accounts then and for some years before, at the F. & M. Bank, and at the Albany Savings Bank. Her bank-books were produced by the witness. These were all her mother had. It was her habit to deposit all her rents and other money to these accounts, so far as witness knew. She kept but a trifling sum of money by her at any time, and had no expenses except those known to witness, nor debts, nor any business transaction calling for $500, or any such sum. Witness knew all her business transactions, and to her knowledge she did not have any such sum of money as $500 in 1875, or at any subsequent period; nor at the time of her death, in 1877, did she have any money whatever in the house. The bank-accounts ran, in one case from 1870, and in the other from 1869, both to 1877, and the accuracy of the pass-books was proven by officers of the different banks. The pass-books were then offered in evidence, against the objection of the defendant. The exception then taken raises the second point made by the appellant. In its support the learned counsel cites the case of Carroll v. Deimel, 95 N. Y. 252. There the matter of "no deposit" in the bank was brought out as an independent and isolated fact. As such it had no legal tendency to prove the issue. Here it takes its place in the affairs of Mrs. Wallace, and, combined with other circumstances in evidence, was proper for the consideration of the jury. Of itself it proved nothing; but when her conduct in the disposition of money was shown; when it appeared that her habit was uniform in regard to it; that she incurred no debts; kept little money about her, but uniformly placed such as she received in one of two banks,—it would permit an inference that so large a sum as $500 would have gone in that direction had she received it; and if not found there, that fact might, with other circumstances, bear upon the question of its receipt. True, she might have received and lost it, or otherwise disposed of it. That was also to be weighed by the jury. It was part of the defense that, with knowledge of the plaintiff and in her behalf, the claim for damages had been settled and paid for to Mrs. Wallace. How was this to be disproved? The plaintiff had not received the money. Sarah Wallace was dead. Might not the tenor of her conduct be shown? Would not the fact that, after the time of the alleged payment, she was or was not possessed of a sum of money of that or about that amount, otherwise unaccounted for, be relevant? It seems to be so. A state of things, then, which gives an opportunity to show it in her possession at that time, or to show that it was not in her possession, may be proved: and, as her habit of business was to deposit money received in one or the other bank, information as to that fact must also be relevant. The defendant says the money was paid. The evidence tends to show that, if paid, it would have been deposited. That it was not deposited, therefore, is inconsistent with its receipt, and is pertinent evidence that it was not paid. The conduct of Mrs. Wallace at that time may speak, although she is unable to. What she did or what she did not do, and even her omission to mention the receipt of money to her daughter, the plaintiff, for whom the defendant assumes she acted, and to whom, therefore, it would have been natural, if not her duty, to mention it if made, also has a bearing upon the question whether payment was in fact made.

Notwithstanding the evidence of De Pfuhl as to the signature to the release, and the indorsement of the draft in the name of Mrs. Wallace, it was conceded by the defendant that neither signature was made by her. The claim upon this trial was that it was made by Mrs. Uline, the plaintiff, and the court charged the jury to inquire whether Mrs. Uline did write those names, and whether "the $500 was paid to either, or paid as they, or either of them, directed the money to be paid. If Mrs. Uline," he said, "signed the name of Mrs. Wallace to those papers, and the $500 has been paid, then she cannot recover. If, on the other hand, she did not sign the papers, or if she did sign them, and the $500 has not been paid either to her or to her mother, or to such persons as she or either of them directed it to be paid, then she can recover, and should recover such damages as you find the property has been injured by the act of the defendant." And later on, after presenting the evidence in a manner satisfactory to both parties, the learned judge said: "If you find that Mrs. Uline did sign the receipt, and did indorse the check in her mother's name, and, further, that either she or her mother received the money, or it was paid to some person to whom they directed it to be paid, then your verdict must be for the defendant."

There was no exception to the charge in any respect, but at its close the counsel for the defendant asked the court to charge "that if Francis De Pfuhl received the money on the check under Mrs. Wallace's indorsement, and at her request, in so doing he acted as her agent, and the payment to him was a payment to Mrs. Wallace." And the court replied: "If she made him her agent for the purpose of receiving the money for her, just as you requested, then the loss would be hers, and not the loss of the company. If, however, De Pfuhl, acting in behalf, or professedly acting in behalf, of the company, proposed to her, if she would sign her name to the papers, he would go and get the money for the purpose of completing the arrangement with her, and would return her the money, then I think that the loss will be the loss of the company, and not the loss of Mrs. Uline or Mrs. Wallace."

It was not suggested by the defendant that the evidence would not warrant a finding in either alternative. The charge requested was given. There was no refusal. It was not error to state to the jury the law upon the other state of facts. The request "that if De Pfuhl's indorsement on the draft raises any presumption that he received the money on it, the legal inference is that he so received it for and on account of Mrs. Wallace, the payee, and that the money so received by him was a payment to Mrs. Wallace, if her indorsement was genuine," was not unlike the one referred to, and was well disposed of. The court had already charged upon the question as affected by the indorsement, and could not, in view of the concession and course of trial, be required to submit any proposition to the jury which assumed that the signature purporting to be that of Mrs. Wallace was genuine. But if the request be treated as implying also that the signature was by her authority, then the court properly answered it. Amplifying what in substance had been twice stated, he declined to pass directly upon that question, saying: "I think it depends upon how the jury find upon that fact. If Mrs. Uline or Mrs. Wallace wished this man to obtain the money upon this check for them, and desired him to go to the bank for their benefit and draw the money, then, if he used the money and misapplied it, it would not be the loss of the company. If, however, De Pfuhl, professing to act for his employer, the defendant, proposed to her that he would obtain the money for her in order that the transaction might be completed, and she, under those circumstances, put her name upon the paper, and sent him to the bank, then she would not be chargeable with the loss of the money if De Pfuhl did not pay it over;" adding: "As both of these theories are consistent with the appearance of the paper, I cannot say as matter of law that either one is the presumptive one upon the mere face of the papers." There was no error in this. Nor was it claimed that the learned trial judge either misstated the evidence, or the findings which it would support. The court cannot be confined to a single abstract proposition, but might, and it was its duty to, submit to the jury in its discretion such topics as either bore upon or were in that connection worthy of their attention.

The other exceptions have been examined. They point to no error. The issues were carefully tried, and we think the judgment rendered upon the verdict should stand. It is therefore affirmed.

NOTE. In Hargreaves v. Kimberly, 26 W. Va. 787, the court, after disposing of other matters, said:

It is also assigned as error that the court permitted the witness Butterfield to give his opinion as to the amount of damage the plaintiffs had suffered by the acts of the defendant; and Yost v. Conroy, 92 Ind. 464, is cited. It is there held, that the opinion of a witness as to the damage a ditch would cause to the lands of a party is not proper evidence. Elliot, J., delivering the opinion of the court, says: "Opinions of witnesses as to the amount of benefit or damage sustained by a party are not competent." He cites a line of Indiana decisions to sustain him, and further says: "It may well be held, that these cases declare the general rule correctly, since to hold otherwise would be to put the witnesses in the place of the jurors, and commit to them the amount of the recovery. A contrary doctrine would also violate the rule, that witnesses cannot express an opinion upon the precise point, which the issues present for the decision of the jury." But the learned court did hold in that case, that "the opinion of one acquainted with the property as to its value with and without the ditch is proper evidence." Now, it seems to me, that it is a very nice distinction. If the witness testifies, that the property is worth $1,000 without the ditch and $800 with the ditch, has he not given his opinion, that the land was damaged just $200? Why may the enquiry not at once be made: "How much is the land injured by the ditch?" If he answers $200, then can not all his reasons for his opinion be elicited on cross-examination? In Snow v. Railroad, 65 Me. 230, it is held, that when the value of real estate taken for a railroad, or the amount of damage caused by such taking is in question, persons acquainted with it may state their opinions as to its value, or as to the amount of damage done, if all is not taken. In Vandine v. Burpee, 13 Metc. (Mass.) 288, a case much like this, it appeared, that on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by the smoke, heat and gas proceeding from the defendant's brick kiln, after two gardeners, who had much experience in raising and cultivating fruit trees, shrubs and plants, had testified to the particulars of the plaintiff's injury, they were asked by the plaintiff, "What was the amount of damage" caused by the injury, to which they had before testified; and it was held that these witnesses might give their opinion as to the amount of such damage. Dewey, J., said: "It seems to us that it would be impracticable to dispense with this species of testimony in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness as to the value of a horse is much more satisfactory evidence than a detailed statement of his size, color, age, &c., to give the jury the requisite information to enable them to assess damages for the conversion of such a horse."

In Railroad Co. v. Foreman, 24 W. Va. 662, it was held, that such evidence was admissible. The court in that case said, by Green, J.: "There is no objection to taking the opinion of witnesses as to either the amount of damages or as to the amount of the benefit. It is the usual practice in this state and Virginia." He cites a number of pertinent authorities to sustain the position.

But the court did err in permitting the witness against the objection of the defendant's counsel to answer the following question: "State if you can what will be the probable damage that will occur in the future from what has already been done to the run in the way of digging, or changing its course?" The witness answered, defendant excepting to question and answer: "Well it is pretty hard for me to answer the question as to the amount of damage, but I think it will be considerable, provided the water course is left in the same condition it is, because it is washing out naturally right against the bank; and if it had been left full up level to the road where the water used to go, of course the bank would have held up. This has took half the lot away; but the prospect is there will be a great deal of slips there with the run." Why this evidence was offered I do not understand. The counsel for the defendant in error in his brief says: "The plaintiffs were unquestionably entitled to recover in this action the damages which were likely to occur in the future as well as those which had already occurred in the past." He cites no authority, neither does he present any argument. It seems to me that both reason and authority are against his position.

In Smith v. Railroad, 23 W. Va. 453, Green, J., said: "Where the damage is of a permanent character, and affects the value of the estate, a recovery may be had at law of the entire damages in one action; but where the extent of the wrong may be apportioned from time to time, separate actions should be brought to recover the damages sustained. He cites Troy v. Railroad Co., 23 N. H. 101; Turnpike Co. v. Stevens, 13 N. H. 28; Parks v. City of Boston, 15 Pick. 198; Blunt v. McCormick, 3 Denio, 283; Thayer v. Brooks, 17 Ohio, 489; Anon., 4 Dall. 147; Tucker v. Newman, 11 Adol. & E. 40.

In Thayer v. Brooks, supra, the action was case for nuisance in diverting the water from the mill of the defendant in error, and the court held that the rule of damages in an action for nuisance is the injury actually sustained at the commencement of the suit.

In Blunt v. McCormick, supra, the court said: "The rule of damages laid down by the court was erroneous. In this action the plaintiff could only recover for injuries actually sustained before suit was brought, and not for supposed prospective damages. Supposing the lease to contain a covenant not to obstruct the light, and the action to have been brought on such covenant, the rule of damages would be otherwise, for the covenant being a single cause of action, one recovery on it would be an absolute bar to any future action. But a recovery in an action on the case, for obstructing the light prior to the time when the action was commenced would not bar a future suit for the continuance of the same injury."

In Turnpike Co. v. Stevens, supra, it was held, that where an action on the case was brought to recover damages for laying out a highway around a turnpike gate, so as to divert the travel from the turnpike, and damages were recovered for the loss of toll occasioned by the opening of the highway to the date of the plaintiff's suit, subsequent suits might be maintained for further damage accruing from time to time, as long as the highway was kept open. A recovery had been had before for dividing the tolls, and it was insisted that no action could be maintained for continuance of the road after recovery had been once had for the opening of the way. But Upham, J., for the court, said: "This is erroneous. The cause of action remains so long as the cause of the injury is upheld by the defendant. It has been in the defendant's power at any time to discontinue the grievance complained of, and so long as this power remains it would be unjust to visit him with damages except during the actual time the damage has been sustained. The injury is not necessarily permanent in its character, and recovery therefor can only be had for the past, as it may cease at any moment. The injury is of the same character as that arising from a nuisance, and is subject to the same rule of law."

It seems to me that in all those cases, where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed, that the defendant would remove it, rather than suffer at once the entire damage, which it might inflict, if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him, for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues. The court erred in admitting this evidence, and for this reason the judgment will have to be reversed.

STODGHILL v. CHICAGO, B. & Q. R. CO.

(5 N. W. 495, 53 Iowa, 341.)

Supreme Court of Iowa. April 20, 1880.

Appeal from circuit court, Wapello county. Christopher Stodghill was the owner of a farm of some 480 acres in Wapello county. Part of said farm consisted of a tract of 29 acres of creek or pasture land. The defendant's right of way for its railroad was located along the north line of said tract. The natural channel of North Avery creek ran across the right of way upon said tract, meandered through it, and recrossed the north line of the land and the right of way. When the railroad was constructed, bridges were built across the creek which spanned the channel and did not obstruct the passage of the water in the stream, nor divert it from where it was wont to flow. In 1874 the defendants cut a channel on the north side of their right of way and filled in the bridge where the stream entered plaintiff's land with earth, which diverted the stream into the new channel entirely, "except as the water backed through a culvert at a point where the water recrosses the right of way; the said bridge at the last named point having been previously removed, a culvert there constructed, and the stream filled in at this point, except the culvert aforesaid."

Christopher Stodghill commenced an action against the defendant for damages to his land by reason of the diversion of the stream. He recovered a verdict and judgment for one dollar and costs. The cause was affirmed upon appeal to this court. See Stodghill v. Railroad Co., 43 Iowa, 26. Said Stodghill died in the year 1876, and by his last will and testament, which was duly admitted to probate, he devised the said 29 acres, with other of his lands, to the plaintiff. This action was commenced in February, 1877, to recover damages for continuing to divert the water from the natural channel of said creek, and for a judgment, directing the abatement and removal of the embankments in the original channel. There was a trial by the court, without the intervention of a jury, and a judgment was rendered for plaintiff for one dollar actual damages, and $75 exemplary damages, and an order was made requiring the defendant to abate and remove said obstructions from the natural channel of the creek. Defendant appeals.

Stiles & Lathrop, for appellant. Wm. McNett and H. B. Hendershott, for appellee.

ROTHROCK, J. 1. When the earth was deposited in the channel of the creek, and raised to a sufficient height to cover over the bridge, and make a solid embankment upon which to lay the railroad track, the water in the creek was at once turned into the new channel. The principal question in the case is whether the judgment for damages, in favor of Christopher Stodghill, was a full adjudication for all injuries to the land, not only up to the commencement of that suit, but for all that might thereafter arise.

In Powers v. City of Council Bluffs, 45 Iowa, 652, the question being as to what is a permanent nuisance, it was held that where it was of such a character that its continuance is necessarily an injury, and that when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated; that successive actions will not lie, and that the statute of limitations commences to run from the time of the commencement of the injury to the property. That was a cause where the plaintiff sought to recover damages against the city for diverting the natural channel of a stream called Indian creek by excavating a ditch in a street in such a manner that it widened and deepened, by the action of the water, so as to injure plaintiff's lot abutting upon said street. The same rule was recognized in Town of Troy v. Cheshire R. Co., 3 Fost. (N. H.) 83. In that case the defendant constructed the embankment of its railroad upon a part of a highway. The action was by the town to recover damages. The plaintiff claimed that it was entitled to recover for the entire damages for the permanent injury. The court said: "The railroad is, in its nature, design and use, a permanent structure, which cannot be assumed to be liable to change. The appropriation of the roadway and materials to the use of the railroad is therefore a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain a highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

The case at bar is a much stronger illustration of what is a permanent nuisance or trespass, for which damages, past, present and prospective, may be recovered, than Powers v. City of Council Bluffs. In this case the damages, to the whole extent, were at once apparent. The water was diverted from the natural channel as soon as the embankment was raised to a sufficient height to turn the current into the new channel. The injury to the land was then susceptible of estimation, as it ever afterwards could be, and without calculating any future contingencies. In the other case, when the water commenced to flow in the new channel, the plaintiff's lots were not injured. It required time to wash away the banks and work backward before the injury commenced. It is not necessary to dwell upon this question. The rule established in Powers v. City of Council Bluffs, supra, is decisive of the case. See, also, Railroad Co. v. Maher (Sup. Ct. Ill.) Chi. Leg. N. July 5, 1879. Counsel for appellees contend that the railroad embankment is not permanent, because it is liable to be washed out by freshets in the stream, and cannot stand without being repaired.

There is no evidence in this record tending to show that the embankment is insufficient to accomplish the purpose for which it was erected; that is, to make a solid railroad track and divert the water into the new channel. One witness testified that it is from 16 to 18 feet high. We will not presume that defendant was guilty of such a want of engineering skill as not to raise its embankments so that they will not be affected by high water. It seems to us that a railroad embankment of proper width, and raised to the proper height, is about as permanent as anything that human hands can make. Before leaving this branch of the case, it is proper to say that the acts complained of were done within the limit of the defendant's right of way, and the injury, if any, to the plaintiff's land was consequential. The defendant did not enter upon plaintiff's land to take a right of way for its railroad, and Christopher Stodghill did not bring his action to recover upon that ground. As we have a statute providing for proceedings to condemn the land necessary to be taken for right of way for railroad purposes, it may be that the mode of ascertaining the damages prescribed by the statute must be pursued. See Daniels v. Railroad Co., 35 Iowa, 129. That question is not in this case, and we only refer to it lest we may be misunderstood.

2. Christopher Stodghill, in his petition in the former action, averred that the diversion of the stream from its natural course across said land perpetually deprived him from the use thereof, to his great damage in the prosecution of his business, and in the depreciation in value of his said farm and pasture lands, and he claimed damages in the sum of $499. The court instructed the jury in that case that they were not to consider the question in regard to any permanent damage to the land, for the reason that plaintiff had the right to institute other suits to recover damages sustained after the commencement of the action.

But the plaintiff claimed damages generally, and by his pleading he and those holding under him must be bound. Indeed, we do not understand counsel for appellee to contend otherwise. The damages being entire, and susceptible of immediate recovery, the plaintiff could not divide his claim and maintain successive actions. The erroneous instructions of the court to the jury did not affect the question. It was the duty of the plaintiff to have excepted and appealed.

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation." Freem. Judgm. § 249. And see Dewey v. Peck, 33 Iowa, 242; Schmidt v. Zahensdorf, 30 Iowa, 498.

The foregoing considerations dispose of the case, and it becomes unnecessary to examine or determine other questions discussed by counsel. Reversed.

FILER v. NEW YORK CENT. R. CO.

(49 N. Y. 42.)

Court of Appeals of New York. 1872.

Action by William F. Filer against the New York Central Railroad Company for damages for personal injuries sustained by plaintiff's wife while alighting from defendant's train. Judgment for plaintiff, and defendant appeals. Affirmed.

George G. Munger, for appellant. J. H. Martindale, for respondent.

ALLEN, J. Successive actions cannot be brought by the plaintiff for the recovery of damages, as they may accrue from time to time, resulting from the injury complained of, as would be the case for a continuous wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages; that is, compensation for all the damages resulting from the injury, whether present or prospective. The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury. To exclude damages of that character, in actions for injuries to the person, would necessarily, in many cases, deprive the injured party of the greater part of the compensation to which he is entitled. Curtis v. Railroad Co., 18 N. Y. 534; Drew v. Railroad Co., 26 N. Y. 49. Any evidence therefore tending to show the character and extent of the injury and its probable results, as well as the probability of a return of the disease induced by the injury, in the ordinary course of nature, and without any extrinsic superinducing cause, was competent to enable the jury to determine the compensation to which the plaintiff was entitled.

In the case of a fractured limb, it was thought that the present and probable future condition of it were proper matters of inquiry. Lincoln v. Railroad Co., 23 Wend. 425. The consequences of a hypothetical second fracture were deemed too remote. The question to Dr. Faling as to the probability, from his experience and medical knowledge, of a recurrence of an inflammation of the injured muscle, and his answer that he could not say the probabilities were very strong, but that he should feel, speaking from experience, that there was danger of the return of the inflammation and accumulation of the fluid, was competent.

The evidence was that of a medical expert, as to the ordinary or probable course of disease in the injured muscle, which had resulted directly from the injury complained of, and related to the future condition of the person injured, so far as that condition could be ascertained from medical learning and experience. So too the opinion of the same physician, that he should expect, if there were no return of inflammation, that the general health of Mrs. Filer would improve, but would always be somewhat impaired, was proper and competent, to enable the jury to ascertain the actual extent of the injury to the plaintiff.

There is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future. The hypothetical opinion of Dr. Hillman as to the cause of the abscess was competent, and the answer, cautiously given, that if they could find no other cause, they would naturally attribute it to the injury complained of, and that such injury received in 1864 was competent to produce the condition he saw in 1867, were properly allowed.

Some latitude must necessarily be given in the examination of medical experts, and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his questions assumes them to be, the opinion may have some weight, otherwise not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question, and for no other purpose.

There was no error in the refusal to charge as requested. The question submitted was whether the abscess and consequent illness were caused by the injury received in November, 1864, and if that was found in the affirmative, the plaintiff, if the other facts were found in his favor, was entitled to recover. There was no evidence authorizing the submission of the question whether the abscess might not have been in part caused by the injury spoken of, and in part by some other means. The other questions made upon this appeal are considered and disposed of in the action at the suit of Helen M. Filer.

There was no error upon the trial, and the judgment must be affirmed. All concur except CHURCH, C. J., who did not vote.

Judgment affirmed.

PARKER v. RUSSELL.

(133 Mass. 74.)

Supreme Judicial Court of Massachusetts. Franklin. June 28, 1882.

Action by Isaac Parker against Electa P. Russell. The declaration alleged "that the defendant, in consideration of the conveyance by the plaintiff to the defendant of certain real estate in Deerfield, promised and agreed to support and maintain the plaintiff, furnishing him with all things necessary and convenient in sickness and in health, during the natural life of the plaintiff; that the defendant accepted said conveyance, and has occupied and used said estate, but has refused and neglected and still neglects and refuses to perform her said agreement."

The evidence showed that in March, 1873, the defendant, for a good consideration, agreed to support the plaintiff during his life; that she did support him in her house from that time till October 1, 1878, when her house was destroyed by fire; and that for two years since the fire the defendant had furnished no support to the plaintiff.

The jury returned a verdict for the plaintiff for $972.25; and found specially that the support of the plaintiff, under the terms of the contract, from the date of the fire to the date of the writ, was of the value of $377.40, and that the same from the date of the fire to the date of the trial was of the value of $473.60. The defendant excepted.

A. De Wolf, for plaintiff. F. L. Greene, for defendant.

FIELD, J. In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to date of the writ, and not up to the time when the verdict is rendered. Fay v. Guynon, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. Amos v. Oakley, 131 Mass. 413; Schell v. Plumb, 55 N. Y. 592; Remelee v. Hall, 31 Vt. 582; Fales v. Hemenway, 64 Me. 373; Sutherland v. Wyer, 67 Me. 64; Lamoreaux v. Rolfe, 36 N. H. 33; Mullaly v. Austin, 97 Mass. 30; Howard v. Daly, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In Pierce v. Woodward, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers v. Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under St. 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton v. Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and Ward v. Rich, 1 Vent. 103, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn v. Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had bound himself to serve the plaintiff for seven years, the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service during the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us. Judgment on the verdict for the larger sum.

NOTE. See, also, the cases under head of "Damages for Breach of Contract for Personal Services," post, 314.

HADLEY et al. v. BAXENDALE et al.

(9 Exch. 341.)

Court of Exchequer, Hilary Term. Feb. 23, 1854.

The first count of the declaration stated that, before and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and meal men in co-partnership, and were proprietors and occupiers of the City Steam Mills, in the city of Gloucester, and were possessed of a steam engine, by means of which they worked the said mills, and therein cleaned corn, and ground the same into meal, and dressed the same into flour, sharps, and bran; and a certain portion of the said steam engine, to wit, the crank shaft of the said engine, was broken, and out of repair, whereby the said steam engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made for the said mill, and had ordered the same of certain persons trading under the name of W. Joyce & Co., at Greenwich, in the county of Kent, who had contracted to make the said new shaft for the plaintiffs; but before they could complete the said new shaft it was necessary that the said broken shaft should be forwarded to their works at Greenwich, in order that the said new shaft might be made so as to fit the other parts of the said engine which were not injured, and so that it might be substituted for the said broken shaft; and the plaintiffs were desirous of sending the said broken shaft to the said W. Joyce & Co. for the purpose aforesaid; and the defendants, before and at the time of the making of the said promises, were common carriers of goods and chattels for hire from Gloucester to Greenwich, and carried on such business of common carriers under the name of Pickford & Co.; and the plaintiffs, at the request of the defendants, delivered to them, as such carriers, the said broken shaft, to be conveyed by the defendants as such carriers from Gloucester to the said W. Joyce & Co., at Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward to the defendants; and in consideration thereof the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there, on the said second day, to deliver the same to the said W. Joyce & Co. for the plaintiffs; and, although such second day elapsed before the commencement of this suit, yet the defendants did not nor would deliver the said broken shaft at Greenwich on the said second day, or to the said W. Joyce & Co. on the said second day, but wholly neglected and refused so to do for the space of seven days after the said shaft was so delivered to them as aforesaid.

The second count stated that, the defendants being such carriers as aforesaid, the plaintiffs, at the request of the defendants, caused to be delivered to them as such carriers the said broken shaft, to be conveyed by the defendants from Gloucester, aforesaid, to the said W. Joyce & Co., at Greenwich, and there to be delivered by the defendants for the plaintiffs, within a reasonable time in that behalf, for reward to the defendants; and in consideration of the premises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying the said broken shaft from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there delivering the same for the plaintiffs in a reasonable time then following for the carriage, conveyance, and delivery of the said broken shaft as aforesaid; and, although such reasonable time elapsed long before the commencement of this suit, yet the defendants did not nor would use due or proper care or diligence in or about the carrying or conveying or delivering the said broken shaft as aforesaid, within such reasonable time as aforesaid, but wholly neglected and refused so to do; and by reason of the carelessness, negligence, and improper conduct of the defendants, the said broken shaft was not delivered for the plaintiffs to the said W. Joyce & Co., or at Greenwich, until the expiration of a long and unreasonable time after the defendants received the same as aforesaid, and after the time when the same should have been delivered for the plaintiffs; and by reason of the several premises the completing of the said new shaft was delayed for five days, and the plaintiffs were prevented from working their said steam mills, and from cleaning corn, and grinding the same into meal, and dressing the meal into flour, sharps, or bran, and from carrying on their said business as millers and meal men for the space of five days beyond the time that they otherwise would have been prevented from so doing, and they thereby were unable to supply many of their customers with flour, sharps, and bran during that period, and were obliged to buy flour to supply some of their other customers, and lost the means and opportunity of selling flour, sharps, and bran, and were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen, to whom they were compelled to pay wages during that period, and were otherwise injured; and the plaintiffs claim £300.

The defendants pleaded non assumpserunt to the first count, and to the second payment of £25 into court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a nolle prosequi as to the first count, and as to the second plea they replied that the sum paid into court was not enough to satisfy the plaintiffs' claim in respect thereof; upon which replication issue was joined.

At the trial before CROMPTON, J., at the last Gloucester assizes it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that on the 11th of May their mill was stopped by a breakage of the crank shaft, by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made, to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

Keating & Dowdeswell, showed cause. Whateley, Willes & Phipson, in support of the rule.

The judgment of the court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case; but in so doing we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and in Blake v. Railway Co., 21 L. J. Q. B. 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at nisi prius. "There are certain established rules," this court says, in Alder v. Keighley, 15 Mees. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally,—i. e., according to the usual course of things, from such breach of contract itself,—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now, the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

CORY v. THAMES IRONWORKS & SHIPBUILDING CO.

(L. R. 3 Q. B. 181.)

Court of Queen's Bench, Hilary Term. Jan. 17, 1868.

This was an issue directed by the court of chancery under 8 & 9 Vict. c. 109, to ascertain the amount of damages to which the plaintiffs were entitled, inter alia, by reason of the delay by the defendants in the delivery of the hull of a floating boom derrick, under a contract of sale.

At the trial before Shee, J., at the sittings in London, after Hilary term, 1864, a verdict was taken for the plaintiffs, subject to a case to be started by an arbitrator.

1. The plaintiffs are coal merchants and ship owners, having a very large import trade in coal from Newcastle and other places into the port of London. The defendants are iron manufacturers and ship builders in London.

2. The plaintiffs had introduced, at the docks where they discharged the cargoes of coal from their ships, a new and expeditious mode of unloading the coals by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and the plaintiffs' trade having considerably increased they were desirous of improving the accommodation offered in the discharge of their vessels by the above mode; this the defendants were not aware of.

3. The defendants had been building for the Patent Derrick Company the hull of a large vessel called a patent boom derrick, which was constructed and fitted with heavy and powerful machinery for raising sunken vessels or other similar purposes requiring great power. The derrick was a large flat-bottomed iron vessel or float, 250 feet long by 90 feet wide and 14 feet deep, divided by iron bulk heads of great strength into more than eighty compartments, measuring generally 15 feet long by 13 feet wide, she was decked over all and had hatchways leading from the deck to the interior.

4. During the constructing of this vessel the derrick company became insolvent, and as the defendants could not obtain payment for the vessel they were obliged to take it upon their own hands and sell it for the best price they could obtain.

5. On the 1st of October, 1861, the plaintiffs entered into the following agreement with the defendants: The defendants agree to sell and the plaintiffs agree to purchase "for the sum of £3,500, the hull of the floating boom derrick now lying in Bugsby's Hole in the river Thames. It is agreed between the parties hereto that payment shall be made in the following manner, that is to say, the sum of £350 at the signing of this memorandum, a further sum of £1,400 when possession is given, which is to be given within three months from the date hereof, and the sum of £1,750 by a bill of exchange to be dated on the day when possession is given, and to be drawn at six months' date" by the defendants and accepted by the plaintiffs. The defendants were to be at liberty to sell the tripod, boom, and other machinery in the hull.

6. The plaintiffs purchased the derrick for the purposes of their business, in order to erect and place in it, as they in fact did, large hydraulic cranes and machinery, such as they had previously used at the docks, and by means of these cranes to transship their coals from colliers into barges without the necessity for any intermediate landing, the derrick, for this purpose, being moored in the river Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there.

7. The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose; and the defendants at the date of the agreement had notice that the plaintiffs purchased the derrick for the purpose of their business, considering that it was intended to be used as a coal store; but they had no notice or knowledge of the special object for which it was purchased and to which it was actually applied.

8. At the date of the agreement the defendants believed that the plaintiffs were purchasing the derrick for the purpose of using her in the way of their business as a coal store; but the plaintiffs had not at that time any intention of applying the derrick to any other purpose than the special purpose to which she was in fact afterwards applied.

9. If the plaintiffs had been prevented from applying the derrick to the special purpose for which she was purchased and to which she was applied, they would have endeavoured to sell her to persons in the hulk trade as a hulk for storing coals, and had they been unable to sell her, they could and would have employed her in that trade and in that way themselves; that was the most obvious use to which such a vessel was capable of being applied by persons in the plaintiffs' business, but the hulk trade is a distinct branch of the coal trade, and neither formed nor forms any part of the business carried on by the plaintiffs; and the derrick being an entirely novel and exceptional vessel and the first of the kind built, no vessel of the sort had ever been applied to such a purpose. The derrick was, however, capable of being applied to and profitably employed for that purpose, and had she been purchased for that purpose her non-delivery at the time fixed by the agreement would have occasioned loss and damage to the plaintiffs to the amount of £420.

10. Great difficulty was experienced in removing the tripod and other things from the

hull in consequence of their enormous weight and size, and the hull was not cleared until the latter end of May, 1862, when it was found that some damage had been done to the bottom and other parts of the vessel in the course of removing the machinery.

11. Upon the hull being cleared, the defendants gave notice to the plaintiffs that they were ready to deliver it to them.

12. The plaintiffs, however, refused to receive the hull until the damage had been properly repaired, and some difference arose between the respective surveyors of the plaintiffs and defendants as to the extent of the injury and the proper mode of repairing it. The plaintiffs continued to make objections to the sufficiency of the repairs until the 1st of July, 1862, when the vessel was delivered.

13. The plaintiffs, on the 1st of October, 1861, duly paid to the defendants £350 in part payment of the purchase-money, and they also duly paid the remainder of the purchase-money at the time when the hull was delivered to them.

14. The three months within which, according to the terms of the agreement, the defendants were to give up to the plaintiffs possession of the hull, expired on the 1st of January, 1862. but the defendants did not deliver it to the plaintiffs until the 1st of July, 1862.

15. The injury caused to the hull in the removal of the machinery depreciated her to the amount of £50.

16. The plaintiffs, in anticipation of the delivery of the hull in January, 1862, entered into a contract with Sir William Armstrong for the construction and delivery to them at a very heavy outlay of the necessary machinery for the purpose for which they purchased the hull, and in consequence of the delay in the delivery of the hull by the defendants the plaintiffs were prevented from taking delivery of the machinery from Sir William Armstrong, and the plaintiffs, on the 25th of July, 1862, paid Sir William Armstrong £3,000, the interest of which was lost to them. The plaintiffs also purchased, at a large cost, two steam tugs to be used, in conjunction with the hull, in towing the coal barges to and from the same, and which steam tugs were comparatively useless to the plaintiffs during the time in which the hull was undelivered, and the interest of the money expended on the same was lost to the plaintiffs; but none of the circumstances were known to the defendants.

17. If the defendants had delivered the hull to the plaintiffs in proper time the plaintiffs would have realized large profits by the use of it in the aforesaid manner, and they were put to great inconvenience and sustained great loss owing to their not having possession of the hull to meet the great increase in their trade.

18. The plaintiffs also lost £8. 15s. for interest upon the portion of the purchase-money of the hull paid by them to the defendants before delivery.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover against the defendants the whole or any, and which of the above heads of damage?

J. Brown, Q. C. (Watkin Williams with him), for the plaintiffs.

The question is to what amount of damages the plaintiffs are entitled by reason of the delay by the defendants for six months in the delivery of the hull of the derrick. It appears from paragraphs 6–9 that the hull itself was a novelty on the Thames, and the special purpose for which the plaintiffs bought it, viz., to tranship coals, by means of hydraulic cranes, direct from the colliers to barges, was also a novelty, and unknown to the defendants; but it also appears that the defendants knew that the hull was to be used by the plaintiffs for some purpose connected with their coal trade, and the defendants supposed that it was to be used as a hulk for storing coals, which was the obvious use to which it might be applied; and if it had been put to this latter use the arbitrator finds that the delay in the delivery would have caused a loss to the plaintiffs of £420. The plaintiffs sustained, in fact, a much greater loss from not having the hull ready for their special purpose (paragraphs 16, 17); but it must be admitted that the plaintiffs, according to the decision in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, are not entitled to claim this greater measure of damages, as the defendants were not aware of the special purpose for which the hull was bought. However, the plaintiffs are entitled, in conformity with the decision in that case, to the £420, as that is the amount of damages which may reasonably be considered as arising naturally from the breach of contract. The plaintiffs would, at all events, clearly be entitled to the interest on their purchase-money (paragraph 18).

[BLACKBURN, J. In the alternative of their not being entitled to the £420.]

Yes; and also to the £50 deterioration (paragraph 15). But the main question is as to the £420, and the mere reading of statement of the arbitrator in paragraphs 6–9 shows that the plaintiffs are entitled to this.

J. D. Coleridge, Q. C. (Garth, Q. C., and Philbrick with him), for defendants.

No doubt the plaintiffs are entitled to the interest, in the alternative, and to the £50; but they are not entitled to the £420. This sum is the damages resulting from a special purpose, within the principle of Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, just as much as the larger sum, which the plaintiffs admit they cannot claim. The rule laid down in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, is a substantial and not merely technical rule, viz., that you are to endeavor to ascertain the real amount of damages that the plaintiff has sustained, and if it is just and reasonable that the defendant should make good this amount, he must pay it; provided that if he had no notice of any circumstance which makes the plaintiff's loss greater than it ordinarily would be, he cannot be called upon to pay this extra damage: and the court of exchequer say if this limit were not put there would be no limit to what defendants in certain circumstances might be called upon to pay; and therefore, say the court, in order to recover from the vendor the damage accruing on account of some special sub-contract or other circumstance, the vendee must affect him with notice. And the court lay down the rule that the plaintiff can only recover such damages as are the natural result of the breach of contract in ordinary circumstances, or,—which would appear to be another mode of expressing the same thing,—what were in the contemplation of both parties at the time of the contract.

[BLACKBURN, J. The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of.]

Accepting that as the statement of the law, what are the facts here? The subject-matter of the contract is entirely novel; and the purpose for which it was intended to be used in point of fact was entirely novel and exceptional; but any use of this hull would be novel and exceptional, so that the £420 comes as much within the rule in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, as the other and larger loss actually sustained.

[COCKBURN, C. J. No doubt, in order to recover damage arising from a special purpose the buyer must have communicated the special purpose to the seller; but there is one thing which must always be in the knowledge of both parties, which is that the thing is bought for the purpose of being in some way or other profitably applied.]

No doubt; but the arbitrator has not found that. He finds the special purpose for which the hull was bought, and to which it was in fact applied, and also the amount of damage which the plaintiffs would have suffered had they applied it to another special purpose.

[BLACKBURN, J. Yes; but the arbitrator (paragraphs 8 and 9) says that was the most obvious purpose, and the one to which the defendants supposed the hull was intended to be applied.]

But it is a use totally distinct from that to which the plaintiffs applied and intended to apply it.

[COCKBURN, C. J. The two parties certainly had not in their common contemplation the application of this vessel to any one specific purpose. The plaintiffs intended to apply it in their trade, but to the special purpose of transshipping coals; the defendants believed that the plaintiffs would apply it to the purpose of their trade, but as a coal store. I cannot, however, assent to the proposition that, because the seller does not know the purpose to which the buyer intends to apply the thing bought, but believes that the buyer is going to apply it to some other and different purpose, if the buyer sustains damage from the non-delivery of the thing, he is to be shut out from recovering any damages in respect of the loss he may have sustained. I take the true proposition to be this. If the special purpose from which the larger profit may be obtained is known to the seller, he may be made responsible to the full extent. But if the two parties are not ad idem quoad the use to which the article is to be applied, then you can only take as the measure of damages the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought. And the arbitrator, as I understand it, finds that the hull was capable of being applied profitably as a coal store; if it had not been applied by the plaintiffs to their special purpose.]

But no vessel of the sort had ever been applied to such a purpose as a coal store. And this kind of damage is a damage which the plaintiffs never suffered, and which they never contemplated suffering.

[MELLOR, J. It was the most obvious purpose to which such a vessel could be applied in the plaintiffs' trade.

[COCKBURN, C. J. And the purpose to which it may be fairly supposed, and as in fact the defendants did suppose, that the plaintiffs would have applied it, had they been prevented by the failure of the machinery, or any other cause, from being able to apply it to their special purpose. And so far as the defendants, the sellers, expected that the plaintiffs, the buyers, would be losers by their non-delivery of the vessel according to contract, so far it is just and right that the defendants should be responsible in damages.]

That, no doubt, would be a just rule; but it is not the rule laid down in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179.

[BLACKBURN, J. That argument seems to assume that the principle laid down in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle laid down in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179. The court say: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i. e. according to the usual course of things, from such breach of contract itself [that is one alternative], or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, in the present case the breach of contract was the non-delivery at the agreed time of a hull capable of being used as a hulk for storing coals, and the consequences that would naturally arise from such non-delivery of it would be that the purchaser would not be able to earn money by its use, and this loss of profit during the delay would be the measure of the damages caused by the non-delivery.]

But the purpose supposed by the defendants was not part of the business of the plaintiffs, the hulk trade being a distinct branch; so that it is impossible to say that the loss of profit which might have been derived from this supposed purpose could have reasonably been contemplated as the natural consequence of the defendants' breach of contract.

[MELLOR, J. That is tying down the arbitrator's finding too strictly. There must be some profitable purpose, and this was the most obvious profitable purpose. Suppose there are two equally profitable but distinct modes of using the same thing, and the buyer contemplates one use, and the seller the other, it is not because the one party contemplated one use and the other the other, that the buyer is not to get any damages at all.]

The answer is, such a case is not within the rule in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179.

COCKBURN, C. J. I think the construction which Mr. Coleridge seeks to put upon the case of Hadley v. Baxendale, 9 Exch. 341, 23 Law. J. Exch. 179, is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with most mischievous consequences, because this would follow, that whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer; and it would be entirely in the power of the seller to break his contract with impunity. That would necessarily follow, if Mr. Coleridge's interpretation of Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, was the true interpretation. My Brother BLACKBURN has pointed out that that is not the true construction of the language which the court used in delivering judgment in that case. As I said in the course of the argument, the true principle is this, that although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent; but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realized if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied. I think, therefore, that ought to be the measure of damages, and I do not see that there is anything in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, which at all conflicts with this.

BLACKBURN, J. I am entirely of the same opinion. I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfilment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case. But Mr. Coleridge's argument would come to this, that the damages could never be anything but what both parties contemplated; and where the buyer intended to apply the thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179. Here the arbitrator has found that what the defendants supposed when they were agreeing to furnish the derrick was that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at £420 during the six months delay; and, as I believe the natural consequence of not delivering the derrick was that that sum was lost, I think the plaintiffs should recover to that extent.

MELLOR, J. I am entirely of the same opinion. The question is, what is the limit of damages which are to be given against the defendants for the breach of this contract? They will be the damages naturally resulting, and which might reasonably be in contemplation of the parties as likely to flow, from the breach of such contract. It is not because the parties are not precisely ad idem as to the use of the article in question that the defendants are not to pay any damages. Both parties contemplated a profitable use of the derrick; and when one finds that the defendants contemplated a particular use of it as the obvious mode in which it might be used, I think as against the plaintiffs they cannot complain that the damages do not extend beyond that which they contemplated as the amount likely to result from their own breach of contract.

Judgment for the plaintiffs accordingly.

HORNE v. MIDLAND RY. CO.

(L. R. 7 C. P. 583.)

Court of Common Pleas, Trinity Term. June 6, 1872.

The plaintiffs, who were under a contract to supply a quantity of military shoes to Hickson & Sons in London (for the use of the French army), at 4s. per pair, an unusually high price, to be delivered there by the 3d of February, 1871, sent the shoes to the defendants' station at Kettering in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station-master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that, unless they were so delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with Hickson & Sons was, owing to very exceptional circumstances, not an ordinary contract. The shoes not arriving in London until the 4th, Hickson & Sons rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1s. 3d. per pair,—2s. 9d. per pair being the ordinary market value.

Sawbridge & Wrentmore, for plaintiffs.
Beale, Marigold & Beale, for defendants.

WILLES, J. This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the non-delivery of the goods here on the 3d of February would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3d and the amount realized by a reasonable sale. That prima facie would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2s. 9d. per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3d and the 4th of February. I find nothing in the case to shew that there was any diminution in the value between those days. The plaintiffs' claim, therefore, in that respect, would be covered by the £20 paid into court.

But they claim to be entitled to £267 3s. 9d. over and above that sum, on the ground that these shoes had been sold by them at 4s. a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3d of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market-price, therefore, we must assume, to have been 2s. 9d. a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4s. a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiffs sustained a loss of 1s. 3d. a pair on the 4595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode,—Everard v. Hopkins, 2 Bulst. 332,—but the notion was corrected in Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179. The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499, at p. 509, viz.

that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2s. 9d. a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3d of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4s. a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3d of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors, but were not communicated to the carriers at the time.

For these reasons, I come to the conclusion that enough has been paid into court to cover all the damages which the plaintiffs are entitled to recover, and that there must be judgment for the defendants.

KEATING, J. I am of the same opinion, upon the ground stated by my Brother WILLES, viz. that the damages claimed are the consequence not of that which could have been contemplated by the parties, but of an exceptional state of things. No doubt, a carrier who fails to deliver in due time goods entrusted to him is liable in damages for the ordinary and natural consequences of his breach of contract. But I think, giving the fullest effect to Hadley v. Baxendale, 9 Exch. 341, 23 Law J. Exch. 179, and the rule there laid down, but which ought not to be extended, we cannot hold the defendants liable in respect of a loss resulting from an exceptional state of things which was not communicated to them at the time. There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts and assented to accept the contract upon those terms. That evidence is not disclosed in this case.

Judgment for the defendants.

NOTE. See this case affirmed in exchequer chamber, L. R. 8 C. P. 131.

GRIFFIN v. COLVER et al.

(16 N. Y. 489.)

Court of Appeals of New York, March Term, 1858.

Action to recover the purchase price of an engine. Defendants sought to recoup damages for delay in delivery of the engine. There was a judgment for plaintiff, from which defendants appealed.

John C. Churchill, for appellants. D. Coats, for respondent.

SELDEN, J. The only point made by the appellants is that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is any thing in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

There is also an additional reason, viz. the difficulty of obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story in the case of The Lively, 1 Gall. 315, Fed. Cas. No. 8,403, which was a case of illegal capture. He says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures and not upon facts."

Similar language is used in the cases of The Amiable Nancy, 3 Wheat. 546, and La Amistad de Rues. 5 Wheat. 385. Indeed, it is clear that whenever profits are rejected as an item of damages it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of Blanchard v. Ely, 21 Wend. 342, must have proceeded upon this ground, and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his own (other) affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach: as where a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfill his collateral agreement, or perform the act supposed. Sedg. Dam. c. 3.

In Blanchard v. Ely the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation, by Cowen, J., of the maritime cases to which I have referred, tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of Masterton v. Mayor, etc., of Brooklyn, 7 Hill, 61, decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss." Sedg. Dam. c. 3. The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected; as in the case of Blanchard v. Ely, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to delivery the horse.

Cases not unfrequently occur in which both these conditions are fulfilled; where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. The case of Freeman v. Clute, 3 Barb. 424, is a case of this class, and affords an apt illustration of the rule. That case was identical in many of its features with the present. The contract there was to construct a steam engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted in that case, as in this, that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits that would have thence accrued. This claim was rejected by Mr. Justice Harris, before whom the cause was tried, upon the precise ground taken here. But he, nevertheless, held that compensation was to be allowed for the "loss of the use of the plaintiff's mill and other machinery." He did not, it is true, specify in terms the mode in which the value of such use was to be estimated; but as he had previously rejected the probable profits of the business as the measure of such value, no other appropriate data would seem to have remained but the fair rent or hire of the mill and machinery; and such I have no doubt was the meaning of the judge. Thus understood, the decision in that case, and the reasoning upon which it was based, were, I think, entirely accurate.

Had the defendants in the case of Blanchard v. Ely, supra, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiffs' contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., are not only susceptible of more exact and definite proof, but, in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is, upon the whole, a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. There is no error in the other allowances made by the referee. The judgment should, therefore, be affirmed.

Judgment affirmed.

LEONARD v. NEW YORK, A. & B. ELECTRO-MAGNETIC TEL. CO.[1]

(41 N. Y. 544.)

Court of Appeals of New York. 1870.

The defendants in 1856 owned and operated a telegraph between Buffalo and New York, connecting at Buffalo with the Western Union Telegraph Company to Chicago, and at Syracuse with a line to Oswego. The plaintiffs were manufacturers of, and dealers in salt, at Syracuse, and had agents, Magill & Pickering at Chicago, and Staats at Oswego. Magill & Pickering had authority to order salt from Staats for sale at Chicago.

On Sept. 24, 1856, Magill & Pickering, acting for plaintiffs, delivered to the Western Union Company at Chicago, a dispatch to be sent to Staats at Oswego, as follows: "D. B. Staats, Oswego: Send 5,000 sacks of salt immediately. Magill & Pickering." And paid the usual charges for transmission. The dispatch was sent by the Western Union Company to Buffalo, and there delivered to the agent of the defendants. It was transmitted by the defendants over their line to Syracuse; and in transcribing it at this point for the purpose of delivery to the Oswego line, the agent of defendants negligently wrote the word "casks" in place of "sacks," so that when the message was delivered to the Oswego line, and by that line to Staats, it read as follows: "D. B. Staats, Oswego: Send 5,000 casks of salt immediately. Magill & Pickering."

The term "sacks" in the salt trade designates fine salt in sacks containing fourteen pounds, and the term "casks" designates coarse salt in packages containing not less than three hundred and twenty pounds.

Staats received the telegram on the afternoon of Sept. 24, 1856, and that evening or the next morning, chartered the schooner S. H. Lathrop, to take the salt to Chicago, and shipped by her 2,733$^{200}/_{280}$ barrels of coarse salt. As soon as Staats received the dispatch he telegraphed to plaintiffs at Syracuse as follows: "Shall I ship Magill & Pickering 5,000 casks? Just received order." On Sept. 25, plaintiffs answered Staats by telegram, as follows: "You may ship Magill & Pickering the 5,000." The last dispatch was received by Staats on the 25th, and on the same day he telegraphed plaintiffs: "Ship along immediately; fleet in, Magill & Pickering telegraphed, send us 5,000 casks salt immediately; I suppose coarse." The plaintiffs received the last dispatch on Sept. 25. On Sept. 26, plaintiffs telegraphed from Syracuse to Magill & Pickering at Chicago, as follows: "What kind of salt do you want? Coarse or fine? Answer." On the same day Magill & Pickering answered the plaintiffs as follows: "Three-quarters fine; balance coarse." Plaintiffs immediately, on same day, telegraphed to Staats at Oswego as follows: "Magill & Pickering's order is three-quarters fine; balance coarse." This dispatch was not received by Staats until after the vessel had loaded the salt, and the bill of lading had been signed and delivered to the master of the vessel, and he had received his clearance. Between the morning of Sept. 24 and the night of Sept. 26, no other communication passed between either Staats and plaintiffs or Staats and Magill & Pickering, or between plaintiffs and Magill & Pickering. The last-mentioned dispatch was received by Staats in the afternoon of Sept. 26. At the time he received it he knew the vessel had finished loading, and supposed she had actually left the Oswego harbor, but it does not appear that he made any effort whatever to ascertain whether she had actually sailed or not. She actually sailed the next day, Sept. 27, but not before five o'clock in the morning. On Sept. 29, Magill & Pickering sent a telegram to Staats, as follows: "Did you ship us any bag salt last week? Send five thousand more now." On Sept. 30 Staats replied as follows: "Have shipped no bags; will by next vessel." On Oct. 2 Magill & Pickering sent the following telegram to Staats: "Asked you to send 5,000 bags, not casks; don't send any more." This dispatch was sent on notice being received by Magill & Pickering of the shipment of the salt by the Lathrop.

The plaintiffs did not know at the time of the shipment of the salt in question, the condition of the market in Chicago for coarse salt, or the value of such salt at that place. The cargo of salt arrived at Chicago on Oct. 15. There was no market for it at Chicago, and Magill & Pickering stored it at the expense of the plaintiffs until 1857, when it was sold for less than one dollar per barrel. The salt was worth at the time of its shipment in Oswego, $1.60 per barrel. The cost of transporting the same to Chicago, exclusive of insurance, was nearly twenty-seven and one-half cents per barrel, and on its arrival at Chicago it was not worth at that place to exceed $1.25 per barrel.

The referee also found that there was no negligence on the part of the plaintiffs or of Staats in shipping the salt in question, or in acting upon the order of Magill & Pickering of Sept. 24, and decided as questions of law, "that the failure of Staats to inquire or ascertain whether the vessel containing the salt in question had actually left the Oswego harbor at the time he received plaintiff's dispatch of the 26th of Sept., or to make any effort to stay the shipment of said salt does not constitute such negligence on the part of the plaintiffs or their agent Staats, as will relieve defendants from liability in the premises." Also, "that the measure of damages to which the said plaintiffs are entitled is the difference in the value of the salt at Oswego and Chicago, with the costs of transportation added thereto, with interest from the time of the arrival of said salt at Chicago." Judgment was affirmed.

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[1] Opinions of HUNT and LOTT, JJ., and dissenting opinions of WOODRUFF and DANIELS, JJ., omitted.

The cause was submitted in June, 1868; a reargument was ordered in Sept. of the same year, and it was reargued in March, 1869; and the court being again divided, another reargument was ordered, which took place at the January term, 1870.

Grosvenor P. Lowery, for appellants. Charles Andrews, for respondent.

EARL, C. J. The appellant seeks a reversal of this judgment upon two grounds, and unless we find its position right in reference to one or both of them, it is conceded that the judgment must be affirmed.

1. It claims that the plaintiffs' agent, Staats, was guilty of negligence in not stopping and unloading the vessel, after he received plaintiffs' dispatch of the 26th of September, and thus avoiding most of the damage which plaintiffs sustained. Before this dispatch was received, the loading of the vessel was completed, the bill of lading was signed and delivered to the master, and he had procured his clearance from the port of Oswego. Staats knew these facts, and knew also that it was usual for vessels, at that season of the year, to hurry their departure. Relying upon these facts, and supposing the vessel had actually sailed, he made no effort to detain her. From all this, the referee found that there was no negligence on the part of Staats, and I see no good reason for disturbing his findings. There were sufficient grounds for concluding, in good faith, that the vessel had sailed; the facts indicated that she had sailed, and I do not see how Staats could be charged with the want of ordinary diligence, in relying upon them. The greatest degree of diligence would doubtless have required Staats to have made inquiries for the vessel, after he received the dispatch. But he was only bound to ordinary diligence, and I do not see how we can find the want of such a degree of diligence against the finding of the referee, and in favor of a party, who upon this question, has the affirmative. Hamilton v. McPherson, 28 N. Y. 76; Milton v. Steamboat Co., 37 N. Y. 210; Costigan v. Railroad Co., 2 Denio, 609; Dorwin v. Potter, 5 Denio, 306; Shear. & R. Neg. § 598.

But aside from this, it is by no means certain that Staats could have obtained the salt from the vessel, if he had made the effort. He had made a valid contract to have the salt transported to Chicago, and the other party to the contract had taken possession of the salt, and entered upon the execution of the contract. What right had Staats to take the salt away from him? I know of no process of law by which he could have done it. And what right did the defendants have to ask Staats to violate his contract with that third party, in order to shield it from the consequences of its own wrong? I am therefore clearly of the opinion that the alleged negligence furnishes no defense to the action.

2. It is also claimed that the referee adopted an erroneous rule of damages, and that the plaintiffs should not in any event have recovered more than they actually disbursed for freight on the salt to Chicago. The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in the courts. The difficulty is not so much in laying down general rules, as in applying them. The cardinal rule undoubtedly is, that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if at the time they entered into it they had bestowed proper attention upon the subject, and had been fully informed of the facts. In this case then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt, as an article of merchandise, and that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago, it would be shipped there as an article of merchandise, to be sold in the open market. And the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, and the difference between the market price at Chicago and the market price at Oswego. I think therefore that the rule of damages adopted by the

referee was sufficiently favorable to the defendant. The damages allowed were certain, and they were the proximate, direct result of the breach.

I do not think, under the facts of this case, that the plaintiffs, when they found the state of the Chicago market, were bound to re-ship this salt to Oswego. For any thing that appears in this case, the cost of transportation to Oswego would have been equal to the difference in the market price between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market when the salt should again be landed there. If the plaintiff had shipped it, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant, the salt had been placed in Chicago, one of the largest commercial centers in the country, and the plaintiffs had the right to sell it there in good faith, and hold the defendant liable for the loss.

I have therefore reached the conclusion that the judgment must be affirmed; and in reaching this conclusion, I believe I am sustained by principles well settled, and by adjudged cases quite analogous. Sedg. Dam. 37; Hadley v. Baxendale, 9 Exch. 341; Saw Mill Co. v. Nettleship, L. R. 3 C. P. 499, 508; Wilson v. Dock Co., L. R. 1 Exch. 177; Griffin v. Colver, 16 N. Y. 489; Hamilton v. McPherson, 28 N. Y. 72; Kent v. Railroad Co., 22 Barb. 278; Medbury v. Railroad Co., 26 Barb. 564; Scoville v. Griffith, 12 N. Y. 509; Cutting v. Railway Co., 13 Allen, 381; Squires v. Telegraph Co., 98 Mass. 232; Telegraph Co. v. Wenger, 55 Pa. St. 262; Telegraph Co. v. Dryburg, 35 Pa. St. 298; Williams v. Barton, 13 La. 404.

Judgment affirmed, with costs.

GROVER, J., dissents.

BOOTH v. SPUYTEN DUYVIL ROLLING MILL CO.

(60 N. Y. 489.)

Court of Appeals of New York. 1875.

Action against the Spuyten Duyvil Rolling Mill Company for breach of a contract to make and deliver by a certain date a quantity of steel caps for rails. At the time of making the contract, defendant was informed that the caps were to be used in making rails to fill a contract which plaintiff had made with the New York Central Railroad Company, but defendant was not informed as to what price plaintiff was to receive for the rails. Both parties knew that the caps could not be procured elsewhere in time to fill the sub-contract. The caps alone had no market value. Defendant's mill was burned before the time for furnishing the caps had expired, and they were never furnished. There was a judgment for plaintiff, from which defendant appealed.

CHURCH, C. J. The point made, that the destruction of the mill by fire was an excuse for the non-performance of the contract by the defendant, is not tenable. In the first place it does not appear nor is it found as a fact, that the burning of the mill prevented such performance. The contract was made December 27th, and the steel caps were to be delivered on the 1st of April thereafter. The mill burned on the 10th of March; and the proper construction of the finding is, that the defendant was prevented after that time from completing the contract, but there was ample time prior to that event to have manufactured the caps. A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. The defendant took the responsibility of the delay. But the case is not within the principle decided in Dexter v. Norton, 47 N. Y. 62, and the authorities upon which it was based. That principle applies when it is apparent that the parties contemplated the continued existence of a particular person or thing which is the subject of the contract, as in the case of the Musical Hall destroyed by fire (Taylor v. Caldwell, 3 Best & S. 826); in the case of an apprentice who became permanently ill (Boast v. Frith, L. R. 4 C. P. 1); and of a woman who, from illness, was unable to perform as a pianist (Robinson v. Davison, L. R. 6 Exch. 269). In these and analogous cases a condition is implied that the person or thing shall continue to exist. In Dexter v. Norton, supra, this principle was applied to relieve a party from damages for a failure to deliver property which was burned without his fault, but it has no application to a case of this character. There was no physical or natural impossibility, inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. The article was to be manufactured and delivered, and whether by that particular machinery or in that mill would not be deemed material. True, the contract specifies the mill as the place, but it necessarily has no importance, except as designating the place of delivery. For aught that appears, other machinery could have been substituted. The defendant agreed to furnish a certain manufactured article by a specified day, and it cannot be excused by an accident, even if it prevented performance. If it sought protection against such a contingency it should have been provided for in the contract. Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272; School Dist. v. Dauchy, 25 Conn. 530. This case belongs to a class clearly distinguishable from those before referred to.

The more important question relates to the proper rule of damages. The referee finds, that prior to the contract with the defendant, the plaintiff had contracted with the New York Central Railroad Company to sell and deliver to it by the 1st of June, four hundred tons of rails to be composed of an iron foundation and steel caps, for the invention of which the plaintiff had obtained a patent; and that when the contract was made with the defendant he informed it that he wanted the caps to perform the contract; that if they had been delivered by the 1st of April the plaintiff could have performed his contract; and he finds, also, facts showing that the plaintiff would have realized the amount of profits for which the recovery was ordered.

The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent. It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly. For a breach of an executory contract to sell and deliver personal property the measure of damages is, ordinarily, the difference between the contract-price and the market-value of the article at the time and place of delivery; but if the contract is made to enable the plaintiff to perform a sub-contract, the terms of which the defendant knows, he may be held liable for the difference between the sub-contract-price and the principal contract-price, and this is upon the ground that the parties have impliedly fixed the measure of damages themselves, or rather made the contract upon the basis of a fixed rule by which they may be assessed. The authorities cited on both sides recognize these general rules. Griffin v. Colver, 16 N. Y. 489; Borries v. Hutchinson, 114 E. C. L. 445; Horner v. Railroad Co., L. R. 7 C. P.

587; Hadley v. Baxendale, 26 Law & Eq. 398; Stockwell v. Phelps, 34 N. Y. 364; Messmore v. Lead Co., 40 N. Y. 422; Randall v. Raper, 96 E. C. L. 82; Parks v. Tool Co., 54 N. Y. 586; Cary v. Iron Works Co., L. R. 3 Q. B. 181; Smeed v. Foord, 1 El. & El. 602; British Col. Co. v. Nettleship, L. R. 3 C. P. 499; Horner v. Railroad Co., L. R. 8 Exch. 131. The difficulty is in properly applying general rules to the facts of each particular case. Here it is found in substance that the contract was made to enable the plaintiff to perform his contract with the railroad company, and that this was known to the defendant. It is insisted however that as the price which the railroad company was to pay the plaintiff for the rails was not communicated to the defendant it cannot be said that it made the contract with reference to such price. It is expressly found that there was no market-price for the steel caps, and it does not appear that there was any market-price for the completed rail. The presumption is, from the facts proved, that there was not. It was a new article, and the contract was made to bring it into use. The result of the able and elaborate argument of the learned counsel for the defendant is, that in such a case, that is when, although the contract is made with reference to and to enable the plaintiff to perform a sub-contract, yet if the terms of the sub-contract, as to price, are unknown to the vendor, and there is no market-price for the article, the latter is not liable for any damages, or what is the same thing, for only nominal damages. I have examined all the authorities referred to, and I do not find any which countenances such a position, and there is no reason for exempting a vendor from all damages in such a case. It is not because the vendee has not suffered loss, as he has lost the profits of his sub-contract; it is not because such profits are uncertain, as they are fixed and definite, and capable of being ascertained with certainty; it is not because the parties did not contract with reference to the sub-contract, when it appears that the contract was made for the purpose of enabling the vendee to perform it. If the article is one which has a market-price, although the sub-contract is contemplated, there is some reason for only imputing to the vendor the contemplation of a sub-contract at that price, and that he should not be held for extravagant or exceptional damages provided for in the sub-contract. But the mere circumstance that the vendor does not know the precise price specified in the contract will not exonerate him entirely. He cannot in any case know the precise market-price at the time for performance. Knowledge of the amount of damages is impracticable, and is not requisite. It is only requisite that the parties should have such a knowledge of special circumstances, affecting the question of damages, as that it may be fairly inferred that they contemplated a particular rule or standard for estimating them, and entered into the contract upon that basis. In Hadley v. Baxendale, 9 Exch. 341, which is a leading case on the subject in the English courts, the court after speaking of the general rule, says: "If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances, so known and communicated."

This case has been frequently referred to, and the rule as laid down somewhat criticised; but the criticism is confined to the character of the notice, or communication of the special circumstances. Some of the judges, in commenting upon it, have held that a bare notice of special consequences which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the views expressed in these cases; and I do not think the court in Hadley v. Baxendale, intended to lay down any different doctrine. See authorities before cited. Upon the point involved here, whether the defendant is exempted from the payment of any damages when there is no market-price, and the price in the sub-contract is not known, there is no conflict of authority that I have been able to discover. In the first place, there is considerable reason for the position that where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a sub-contract, and knows that there is no market-price for the article, he assumes the risk of being bound by the price named in the sub-contract, whatever that may be, but it is unnecessary to go to that extent. It is sufficient to hold, what appears to me to be clearly just, that he is bound by the price, unless it is shown that such price is extravagant, or of an unusual and exceptional character. The presumption is, that the price at which the property was sold was its fair value, and that is to be taken as the market-price for the purpose of adjusting the damages in the particular case. This presumption arises here. The profits were not unreasonable, certainly not extravagant. About fifteen per cent was allowed for profits, including the use of the patent, and no evidence was offered, or claim made, that the price was not the fair value of the article. We must assume that it was, and hence within the contemplation of the parties. The case of Borries v. Hutchinson, 114 E. C. L. 443, is quite analogous to this. The article, caustic soda, was purchased to be sold to a foreign correspondent, which the defendant knew. There were several items of damage claimed. The profits on the sub-contract were conceded, and the money paid into court, but the court held, in passing judgment, that the plaintiff was entitled to recover such profits. Erle, C. J., said: "Here the vendor had notice that the vendee was buying the caustic soda, an article not ordinarily procurable in the market, for the purpose of resale to a sub-vendee, on the continent. He made the contract, therefore, with the knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad."

The case of Elbidger v. Armstrong, L. R. 9 Q. B. 473, also illustrates the rule. That was a contract for the purchase of six hundred and sixty-six sets of wheels and axles, which the plaintiff designed to use in the manufacture of wagons; and which he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a day. The defendant was informed of the contract, but not of the amount of penalties. Some delay occurred in the delivery, in consequence of which the plaintiff had to pay £100 in penalties, and the action was brought to recover that sum. There was no market in which the goods could be obtained, and the same point was made there as here, that the plaintiff was only entitled to nominal damages; but the court says: "When from the nature of the article, there is no market in which it can be obtained, this rule (the difference between the contract and market value) is not applicable, but it would be very unjust if, in such cases, the damages must be nominal."

It is true that the court held that the plaintiff could not recover the penalties as a matter of right, mainly upon the ground that such a consequence was not, from the nature of the notice, contemplated by the parties; and yet the judgment, directing the amount of the penalties paid, was allowed to stand, as being a sum which the jury might reasonably find. Cary v. Iron Works Co., L. R. 3 Q. B. 181, decided that when the article purchased was designed by the purchaser for a peculiar and exceptional purpose unknown to the seller, the latter was nevertheless liable for the damages which would have been incurred if used for the purpose which the seller supposed it would be used for.

The case of Horner v. Railway Co., L. R. 8 C. P. 134, is not in conflict with the position of the plaintiff. In that case the article had a well-known market-value. The sub-contract was at an unusual and extravagant price, of which the defendant was not informed. Besides, the defendant was a carrier, and it was seriously doubted by some of the judges whether the same rule would apply to a carrier as to a vendor. The question in all these cases is, what was the contract? and a carrier who is bound to take property offered at current rates would not, perhaps, be brought within the principle by a notice of ulterior consequences, unless such responsibility was sought to be imposed as a condition, and he have an opportunity to refuse the goods; or unless a special contract at increased rates was shown. The decision was placed upon the ground that the exceptional price was not within the contemplation of the parties. The authorities in this state support the doctrine of liability in a case like this. The cases of Griffin v. Colver and Messmore v. Lead Co., supra, especially the latter, decide the same principle. The defendant in that case was informed of the price of the sub-contract, but the decision was not put upon that ground. This case presents all the elements which have been recognized for the application of the rule of liability. The plaintiff contracted with the defendant expressly to enable him to perform his contract with the railroad company, which the defendant knew. The goods could not have been obtained elsewhere in time; and in consequence of the failure of the defendant to perform his contract, the plaintiff lost the benefit of his sub-contract. It is not claimed that the price at which the completed rails were agreed to be sold was extravagant or above their value; and as there was no market-price for the article, the fact that the defendant was not informed of the precise price in the sub-contract does not affect its liability. Nor does the fact that the defendant's contract does not embrace the entire article resold, relieve it from the consequences of non-performance. It was a material portion of the rail, without which it could not be made; and solely by reason of the failure of the defendant, the plaintiff failed to perform his contract, and thereby lost the amount for which he has recovered. We concur with the opinion of the referee and court below, in their views, holding the defendant liable. The judgment must be affirmed. All concur.

Judgment affirmed.

MATHER v. AMERICAN EXP. CO.

(138 Mass. 55.)

Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 1, 1884.

Action against the American Express Company for breach of a contract to transport a package containing an architect's plans for a house. There was a finding for plaintiff, and defendant excepted.

J. C. Hammond, for plaintiff. D. W. Bond, for defendant.

FIELD, J. It is not denied that the defendant is liable in damages for the reasonable cost of the new plans, and for other expenses, if there were any reasonably incurred in procuring the new plans; but it is denied that the defendant is liable in damages for the delay in constructing the house occasioned by the loss of the plans. It is assumed that the plans had no market value, and were only useful to the plaintiff. The rule of damages then is their value to the plaintiff. As new plans could not be bought in the market ready made, some time necessarily must be consumed in making them, and the plaintiff contends that the value of the plans for immediate use, or for use at the time he would have received them from Boston, if the defendant had duly performed its contract, is their value to him, and that this value is made up of the cost of procuring the new plans and the damages occasioned by the delay. Whatever he calls it, it is damages for the delay in constructing the house, caused by the loss of the original plans, that he seeks to recover. It does not appear that the defendant had notice of the contents of the package at the time it was delivered for transportation, or any notice or knowledge that the plaintiff needed the plans for the construction of a house which he had begun to build. The damages caused by the delay are not such as usually and naturally arise solely from a breach of the contract of the defendant to carry the package safely to its destination, nor were they within the reasonable contemplation of both parties to this contract, as likely to arise from such a breach. The fact that the plans had a special value to the plaintiff, and could not be purchased, does not touch the question of including in the damages the injury to the plaintiff occasioned by reason of other contracts which he had made, and of work which he had undertaken in expectation of having the plans for use immediately, or after the usual delay involved in sending the plans to Boston, and in having them traced and returned to him. Damages for such injury are not given unless the circumstances are such as to show that the defendant ought fairly to be held to have assumed a liability therefor when it made the contract.

We think that Hadley v. Baxendale, 9 Exch. 341, which has been cited with approval by this court, governs this case.

The case of Green v. Railroad Co., 128 Mass. 221, on which the plaintiff relies, was an action to recover the value of an "oil painting, the portrait of the plaintiff's father." The opinion attempts to lay down a rule for determining the value of such a painting when the plaintiff had no other portrait of his father, and when, so far as appears, it had no market value; but the opinion does not discuss any question of damages not involved in determining the value of the portrait to the plaintiff. The plaintiff in that case made no claim for damages occasioned by a loss of a profitable use of the portrait.

Exceptions sustained.

ABBOTT et al. v. HAPGOOD et al.

(22 N. E. 907, 150 Mass. 248.)

Supreme Judicial Court of Massachusetts.
Worcester. Nov. 29, 1889.

Report from superior court, Worcester county; HAMMOND, Judge.

This is an action brought to recover damages for breach of contracts made by the defendants to furnish the Penn Match Company, Limited, of Philadelphia, certain machines used in the manufacture of matches, and certain match splints for the manufacture of matches. The said contracts are the same which were before the supreme judicial court in the case of Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. Rep. 22. The plaintiffs in this writ are described as "Francis R. Abbott, Charles Kee, and Wm. B. Kempton, all of Philadelphia, in the state of Pennsylvania, as they are copartners and associated together in business under the firm name and style of the 'Penn Match Company, Limited.'" The defendants did not call attention at the trial to the specific fact that they made any point in defense that the use in the writ of the present tense of the verb in "as they are co-partners" described this firm as it existed at the date of the writ, viz., May 12, 1888. It had in fact appeared in the plaintiffs' testimony that Kempton had been in the business only a year or two, and was not connected with it at all when this suit was brought. It being agreed that the questions raised by the demurrer might be raised at the trial with the other questions, the following evidence material to the questions raised by the report was put in: The plaintiffs Abbott and Kee, with one William Brown, entered into a contract under the act of assembly of Pennsylvania approved June 2, 1874. Brown died about January 13, 1882, and the affairs of that concern were wound up, and a release from the administrator of Brown's estate was given February 7, 1882. The defendants had sold match splints to said concern, and had received a letter dated January 23, 1882, signed "PENN MATCH CO., LIMITED, FRANCIS R. ABBOTT, Tr.," ordering one each of defendants' "setting" and "rolling-off" machines, and at the time of the contracts sued on were making said machines. About the middle of February, 1882, the plaintiff Kempton agreed verbally to join them in forming a company, under the said statute of Pennsylvania, of the same name as the former, to prosecute the same business of manufacturing matches, in Philadelphia. The plaintiffs together agreed that they would organize said company under said statute, and would build a factory for the purpose of such manufactory, provided they could get the machinery, such as is mentioned in the contracts sued on. Thereupon, for the purpose of carrying out said agreement, and in the name of and for the benefit of the projected company, the plaintiffs applied to the defendants, who made the contracts in question, the plaintiffs made known to the defendants that the projected company would proceed with its organization, and would cause a factory to be built for it only in case they could make a contract with the defendants to furnish the machines. The plaintiffs told the defendants they would like them to give a written contract for the machines already ordered,—that is, one rolling-off machine and one setting machine,—and also attach to it an additional order for four more setting machines and one rolling-off machine. After some conversation, the defendants signed and delivered the contracts sued on. After the contracts were made, the plaintiffs gave up the idea of building the factory jointly, and Abbott and Kempton proceeded to build the factory for the use of the firm, with the arrangement that it should be verbally leased to the Penn Match Company, Limited, for the purpose of transacting its business, to-wit, the match business the plaintiffs had agreed to go into. The factory was completed about July 15, 1882, and the Penn Match Company paid rent from that time. On October 3, 1882, the plaintiffs made an agreement to carry out the arrangement entered into in February, 1882, and no business was done until after July 15th, when the factory was finished, except that the plaintiffs made some match-boxes, with a view preparatory to this company (the Penn Match Company) being organized, and so as to have them on hand. The records required by the statutes of Pennsylvania, as to limited partnerships, were duly made. Evidence was offered that in May, 1882, the defendants, after some letters stating that the machines would soon be made, refused to perform said contracts. The plaintiffs offered evidence of damage to them, as individuals, independent of their membership of their association. They likewise offered evidence of expenses incurred and damages suffered by the association in consequence of the defendants' refusal to deliver the machines and the match splints. The defendants put in the judgment for the defendants, which was rendered on the demurrer after the decision of the supreme judicial court in Match Co. v. Hapgood, 141 Mass. 146, 7 N. E. Rep. 22.

The defendants asked the court to rule: (1) There is no evidence to warrant a verdict for the plaintiffs. (2) The contracts are in terms with the Penn Match Company, Limited, and that company was not organized at the time of the contracts, and there never was any contract which would bind that company, and the plaintiffs cannot recover. (3) The judgment in the case of Penn Match Company, Limited, v. Hapgood and another is a a bar to this action. (4) If, after the death of Brown, the present plaintiffs agreed together to form a limited partnership, under the statute of Pennsylvania, which has been put into the case, for the manufacture of matches, under the name of the "Penn Match Company, Limited," and with the purpose and to the end of doing so, and in the name of and for the benefit of the projected limited partnership procured these contracts, the aforesaid judgment is a bar to recovery in this case. The court declined to rule as requested by the defendants, and ruled that the association, by the agreement of October 3, 1882, is so far different from the organization of the plaintiffs, as general partners, that in this case no damages suffered by the association can be assessed, and the only damages which can be recovered are such as the plaintiffs themselves have suffered independently of their membership of the association. The plaintiffs objected and excepted to this ruling, so far as it limited damages. The court overruled the defendants' demurrer, and they appealed; the ruling being that the plaintiffs could recover such damages as they suffered independently of the association formed under the statute, by reason of the non-performance of the contracts. A verdict was directed for the plaintiffs, with the understanding that the case should be reported, and the same is now reported, for the determination of the supreme judicial court. If the rulings are correct, the parties agree that the case shall be sent to an assessor to assess the damages. If the demurrer should have been sustained, or if, upon the evidence, a verdict should have been ordered for the defendants, the verdict is to be set aside, and judgment for the defendants entered; unless the ground for ordering judgment is such that it could have been cured by amendment, if it had been pointed out at the trial, in which case the court shall enter such judgment or order as shall seem just. If the plaintiffs are entitled to recover such damages as were suffered by the association organized under the agreement of October 3, 1882, the verdict is to be set aside, and a new trial ordered.

W. S. B. Hopkins, for plaintiffs. *F. P. Goulding*, for defendants.

KNOWLTON, J. According to the terms of the report in this case, if the demurrer should have been sustained, on grounds which could have been removed by amendment, the plaintiffs are to be permitted to amend. The defendants have made no point upon the use of the present tense instead of the past tense in the allegation in the writ as to the partnership of the plaintiffs, and, if that is material, it may be corrected by amendment. In each count of the declaration, after alleging that there was a valuable consideration for the defendants' contract, the plaintiffs aver that the contract was reduced to writing, and set out as the contract a writing which shows no consideration nor mutuality, but merely an undertaking on one side. To state the contract truly, they should set out in each count their own agreement which constituted the consideration for the agreement made by the defendants. The substantive grounds of defense rest upon the rulings, and refusals to rule, in regard to the effect of the evidence. There was an attempt to recover under the contracts now before us, by a suit brought in the name of the Penn Match Company, Limited, against these defendants. In that case the plaintiff was alleged to be a corporation, and the hearing and decision were upon a demurrer which admitted that allegation to be true. If we assume that the limited partnership organized under the laws of Pennsylvania was so far an entity, separate from the persons who were members of it, that it could sue and be sued in this commonwealth as a corporation can, it is quite clear that it was not a party to the contracts declared on. Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. Rep. 22. If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it. Kelner v. Baxter, L. R. 2 C. P. 174; Gunn v. Insurance Co., 12 C. B. (N. S.) 694; Melhado v. Railway Co., L. R. 9 C. P. 503; In re Engineering Co., L. R. 16 Ch. Div. 125. Upon the facts reported in the present case, the defendants, as well as the plaintiffs, must have understood that the limited partnership was only projected, and that the plaintiffs, acting jointly as individuals, or as general partners, constituted the only party who could contract with the defendants in the manner proposed. It is evident that both parties intended to enter into binding contracts. As recited in the report, for the purpose of carrying out their agreement to form a limited partnership, "and in the name of and for the benefit of the projected company, the plaintiffs applied to the defendants who made the contracts in question, and the plaintiffs made known to the defendants that the projected company would proceed with its organization and would cause a factory to be built for it, only in case they could make a contract with the defendants to furnish the machines."

We are of opinion, in view of the facts known to both parties, that the plaintiffs must be deemed to have been jointly contracting in the only way in which they could lawfully contract, and that they assumed the name "Penn Match Company, Limited," as that in which they chose to do business, in reference to the projected limited partnership, until their organization should be completed, and they should turn over the business to the new company, which would be composed of themselves in a new relation. This seems to be warranted by the language of the report, and entirely consistent with their purpose made known to the defendants, and in this way only can effect be given to their acts. The judgment in the former suit is no bar to this action, for that suit was brought by a different plaintiff.

On the subject of damages, the report does not sufficiently state the evidence to enable us fully to determine the rights of the parties. As we understand the rule laid down by the presiding justice, that "the only damages which can be recovered are such as the plaintiffs themselves have suffered independently of their membership of the association," we are of opinion that it is too narrow. In the view which we take of the agreement, the plaintiffs contracted for articles to be delivered to themselves. They informed the defendants that they had agreed to organize a limited partnership, of which they were to be the sole members, and that they made the contracts to enable them profitably to carry on business in their new organization. By reason of the defendants' breach of contract, the plaintiffs were unable to turn over to the new company the property which they should have received for that purpose, and they have been unable to establish that company, and start it in its work under such favorable auspices, and with such an equipment for the transaction of a profitable business, as if the defendants had performed their contracts. The only damages for which the defendants are liable to any one must be recovered in this action, and, inasmuch as the machines could not be procured in the market, we are of opinion that the parties must be presumed to have contracted in reference to the declared purpose for which they were to be furnished, and that that purpose may be considered in assessing the damages. Machine Co. v. Ryder, 139 Mass. 366; Manning v. Fitch, 138 Mass. 273; Townsend v. Wharf Co., 117 Mass. 501; Somers v. Wright, 115 Mass. 292; Cory v. Iron-Works, L. R. 3 Q. B. 181; Portman v. Middleton, 4 C. B. (N. S.) 322; McHose v. Fulmer, 73 Pa. St. 365.

We do not intimate that the plaintiffs are to receive any damages as members of the limited partnership, but only that the damages which they suffered, if any, by reason of the defendants' preventing them from successfully establishing and fitting out a business to be conducted by them as a limited partnership, may be recovered. The mere fact that they arranged to conduct their business by a limited partnership, under the statute of Pennsylvania, does not deprive them of the rights which they then had in the business, nor of the advantages which properly belonged to it. The value of the articles contracted for may be estimated in reference to their intended use in the business for which the defendants were to furnish them. The plaintiffs are to have leave to amend their writ and declaration as they shall be advised, and the case is to stand for trial. So ordered.

BROWNELL et al. v. CHAPMAN.

(51 N. W. 249, 84 Iowa, 504.)

Supreme Court of Iowa. Feb. 2, 1892.

Appeal from superior court of Council Bluffs; J. E. F. McGee, Judge.

Action on a contract, in substance as follows: "April 12th, 1889. D. Chapman, Esq., Council Bluffs, Iowa—Dear Sir: We will furnish you one of our Scotch marine boilers, 54 dia., 84 long, made of 60,000 T. S. marine steel shells, 5-16; * * * all the above delivered and set up, (you to do all wood-work,)—for the sum of ten hundred and twenty-three dollars, ($1,023.00.) We will allow you three hundred and sixty dollars ($360.00) for your two engines, boiler, heater, and inspirater, wheels, shafting, and couplings. Hoping to receive your order, we are, yours truly, Brownell & Co. P. S. We guaranty to deliver above in thirty days from April 13th. It is understood you are to have 90 days' option on sale of engine and boiler you have." "Accepted. D. Chapman." This action is to recover the balance of the contract price, after deducting the $360 for the defendant's engines, etc. There was a failure to deliver the boilers, etc., on the part of the plaintiffs for some 18 days after the time specified in the contract; and the defendant presents a counter-claim because of the failure and for defective workmanship in putting in the boilers. A reply put in issue certain allegations of the counter-claim, and a trial by jury, resulting in a verdict and judgment for the defendant for $31.25. The plaintiffs appeal.

Isaac Adams, for appellants. D. B. Daily, Emmet Finley, and Ambrose Burke, for appellee.

GRANGER, J. 1. Lake Manana is a small lake in the vicinity of Council Bluffs, in Pottawattamie county, and is a summer and pleasure resort. Boats are used on the lake for the accommodation of visitors, and among them was one known as the "M. F. Rohrer," belonging to the defendant. The boat was operated on the lake in the season of 1888, and the boilers and machinery contracted for, as known to the parties, were to refit the boat for use in the season of 1889. A breach of the contract on the part of plaintiff by a failure to deliver within the time is not questioned, and the important question on this appeal is as to the proper measure of damage. The superior court admitted evidence to show, and instructed the jury on the theory, that the measure of damage was the rental value of the boat during the time the defendant was deprived of its use in consequence of the breach. The appellants' thought is that the measure of damage is the "interest of the capital invested in the boat." This latter rule has something of support in authority, but it is far outweighed by the number of cases and the reasoning supporting the rule adopted by the court. In considering the question we must keep in view the rule, universally recognized, that the damage for breach of contract must be limited to such as would naturally come within the contemplation of the parties at the time the contract was made. The plaintiff, when it agreed to furnish and set the boilers, knew they were to be used in operating the boat; that a breach on its part would deprive the plaintiff of its use; and it would naturally contemplate the value of such use as the injury that would be sustained; and such is, as a matter of fact, the actual damage. The appellants cite a number of cases, but all except two, we think, support the rule adopted by the court. Brown v. Foster, 51 Pa. St. 165, is a case quite similar to this. Repairs to a boat by putting in machinery were to be completed by October 1st. The work was not done until December 15th. The trial court gave, as the rule of damage, "that the measure in such a case is the ordinary hire of such a boat for the time in question, for the time plaintiff was in default." The complaint in that case of the rule as given was by the defendant, who was seeking damage, and the court said his complaint was without reason. The case cited is not authority for the appellants' position. In Mining Syndicate v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, the interest on the investment in a mill that had been delayed because of defective machinery was allowed as the measure of damage, but only in case the jury found there was no evidence of the rental value of the mill. The case clearly recognizes the rule as to rental value as a correct one. In Griffin v. Colver, 16 N. Y. 489, is the following syllabus, having full support in the opinion: "Upon a breach of a contract to deliver at a certain day a steam-engine built and purchased for the purpose of driving a planing-mill and other definite machinery, the ordinary rent or hire which could have been obtained for the use of the machinery whose operation was suspended for want of the steam-engine may be regarded as damages." In Nye v. Alcohol Works, 51 Iowa, 129, 50 N. W. 988, this general principle has support argumentatively, but another rule, because of distinguishing facts, is sustained. The cases of Allis v. McLean, 48 Mich. 428, 12 N. W. 640, and Taylor v. Maguire, 12 Mo. 313, are not in harmony with this view, but they are clearly overborne by the weight of the other cases and the current of authority. The latter case cites, as decisive of the point, Blanchard v. Ely, 21 Wend. 342. In Griffin v. Colver, supra, the Blanchard Case is commented upon and explained, and, in effect, it is divested of the authority claimed for it in the Missouri case.

But it is said that the boat in question had no established rental value. By this it is meant that the boat had never been rented. But it will not do to say that because an article has never been rented it has no rental value, any more than it would to say that because an article had never been sold it has no market value. We should assume that an article suitable and adapted for use at a time and place has both a market and rental value, at least until the contrary appears. In Jemmison v. Gray, 29 Iowa, 537, this court approved an instruction that "the fact, if proven, that 12,213 ties could not have been purchased for immediate delivery in the market at the places where said ties were to be delivered on the 1st day of October, 1869, would not, of itself, establish the fact that there was not a market price for such ties at such time and place." The holding affords a strong presumption in favor of a market price. A like presumption would prevail in favor of an article having a value for hire at a time and place where such articles are in demand for use. The testimony shows that boats varying in size were rented on the lake during the season, both by the day and for trips. This boat had perhaps twice the carrying capacity of any other boat on the lake, and in that respect formed an exception; but the rental value of boats depended on their size and adaptation for use, and it was competent for persons having knowledge of the business and prices paid for other boats to give an opinion as to the rental value of such a boat as the one in question. It is contended that the method of ascertaining the rental value involves the uncertainties and facts on which profits are excluded as a rule of damage; but we think not. It is true that rental values are generally fixed from a calculation of the profits to be derived from the use, but the rental is a fixed, definite value, agreed to be paid, and the bailee assumes the uncertainties as to the profits.

The appellants say: "For an analogous case to the one at bar, in there being an attempt to prove a rental value to property when the facts showed that the property in question had no rental value, the court is referred to Coal Co. v. Foster, 59 Pa. St. 365." The case, as we we read it, is without a bearing on the question. The defendant agreed to furnish for the coal company an engine of a particular size and make. There was no other engine of the kind that the company could use. There was a delay in the delivery, and the company was compelled to transport its coal by horse-power, as it had before done. The trial court gave the rule "that the measure of damage for the delay was the ordinary hire of a locomotive during the period of delay." The reviewing court gave the rule as the difference between the cost of transporting the coal by horse and by locomotive power, but placed its ruling on the fact that the parties knew there was no other engine to be operated on the track of the company, and could not have had such damage in view in making the contract. It will be seen that the cases are different. If in the case at bar the defendant's boat had been operated at an additional cost by doing the same amount of work during the delay, it would be reasonable to say the damage to him was the difference in the cost. But his is an entire loss of use, and the value of such use is the damage, where it is proximate, and not speculative or uncertain.

2. A part of the counter-claim is for loss of time by men kept in readiness by defendant to do the part of the work belonging to him in adjusting the boilers and machinery, as provided by the contract. On this branch of the case the court gave the following instruction: "(5) If you find from the evidence, and under the third and fourth instructions, that there was a contract, as set out, between plaintiffs and defendant, and that plaintiffs were in default in carrying out said contract; and if you find that, by reason of such default, defendant was damaged; and if you further find that defendant was in readiness to carry out his part of said contract at the time specified therein; and that at the time he was in readiness to run and operate his boat; and that the boat was necessarily idle during the period of plaintiffs' default, by reason of such default, —then the defendant would be entitled to recover the ordinary and reasonable rental value of said boat during the time of said default, and such reasonable and necessary amount (if there be any such amount) as he may have been required to pay to any men that he may have employed during said enforced idleness for the purpose of running said boat, if he had any such men in his employ who remained in his employ and idle by reason of such default; and if you find that the defendant had placed himself in readiness to work upon said boat himself at the time specified in the contract for the furnishing of said machinery, and that he necessarily remained idle during the time of such default, if any, of the plaintiffs, and used ordinary diligence to find other employment for that time, you will then further find the fair and reasonable value of his services during the period of such default as part of the damage, if any, which defendant sustained." Complaint is made of the instruction, as stating an erroneous rule of damages, but we discover no error. If, because of the breach, the defendant lost his or the time of his employes, for such time and expense he should be reimbursed. The rule is recognized in Mining Syndicate v. Fraser, supra. The instruction fairly protects the rights of the plaintiffs. A number of other questions are argued, all of which we have examined, and find no prejudicial error. It would serve no good purpose to extend the opinion to present them. The judgment is affirmed.

MASTERTON ET AL. v. MAYOR, ETC., OF CITY OF BROOKLYN.

(7 Hill, 61.)

Supreme Court of New York. Jan. Term, 1845.

This was an action of covenant commenced in 1840, and tried at the New York circuit in June, 1843, before Kent, C. J. The case was this: January 26, 1836, a covenant was entered into between the defendants and the plaintiffs, by which the latter agreed at their own risk, costs and charges, to furnish, cut, fit, and deliver (properly and sufficiently prepared for setting), at the site of the city hall in the city of Brooklyn, all the marble that might be required for building the said city hall, according to certain plans and specifications then exhibited and signed by the respective parties, and in conformity with such drawings, molds and patterns as should from time to time be furnished by the superintendent or architect of the said city hall; all of the said marble to be of the same quality as that used for the ornamental and best work on the new customhouse in the city of New York, and of the best kind of sound white marble from Kain & Morgan's quarry, in Eastchester, free from spalts, cracks, and blemishes, and wrought in the best manner of workmanship, and tooled and rubbed, etc., as should be ordered by the superintendent. It was further agreed by the plaintiffs that they would proceed forthwith to the execution of the work with all diligence and with a sufficient force; and that they would commence the delivery of the marble as soon after the opening of navigation in the spring as might be required, and continue delivering the same in such order and at such times and as fast as the superintendent should direct. They also agreed that the marble thus delivered should be subject to inspection and rejection by the superintendent, and remain at the risk of the plaintiffs until the superintendent inspected and accepted it. And the defendants, in consideration of the above stipulations, agreed to pay the plaintiffs the sum of $271,600, at the times and in the manner following, viz. the sum of $10,000 when the basement of the said city hall was half up; the sum of $15,000 when the whole of the basement was up; the sum of $20,000 when the first story was half up; the sum of $20,000 when the whole of the first story was up; the sum of $20,000 when the second story was half up; the sum of $20,000 when the whole of the second story was up; the sum of $20,000 when one-half of the cornice of the superstructure was up; the sum of $20,000 when the whole of the cornice was up; the sum of $50,000 when the columns and capitals were up; the sum of $25,000 when the entablature was complete; the further sum of $20,000 when the interior work was done; and the remainder when the building was finished. The declaration alleged a breach of this covenant in 1837, and claimed various items of special damage.

March 7, 1836, the plaintiffs entered into a covenant with Kain & Morgan. This covenant, after referring to the one entered into with the defendants, and reciting a part of the same, provided that Kain & Morgan should furnish from their quarry, in Eastchester, all the marble required for erecting, completing and finishing the city hall in the city of Brooklyn, in such blocks, pieces and proportions, and in such condition for working, as is usual and customary; and deliver the same to the plaintiffs, free of all expense, on a wharf in the city of Brooklyn, etc.; the blocks to be delivered so that there should be sufficient time to work and fit the same for the said superstructure, and equal in quality to that used for the superstructure and interior above the basement of the new custom house in the city of New York, etc. The remainder of the covenant was as follows: "And the said parties of the first part (the plaintiffs), in consideration, etc., do hereby covenant and agree to pay the said parties of the second part (Kain & Morgan) in the aggregate the sum of $112,395, which amount shall be paid in different sums, from time to time, out of the sum of $271,600 to be paid by the said mayor, etc. (the defendants), to the said parties of the first part, as the same from time to time may be paid to them, etc.; that is to say: The said parties of the first part shall and will make payment to the said parties of the second part at the same times that they, the said parties of the first part, receive their payments from the mayor, etc. (the defendants). And the several payments thus to be made to the said parties of the second part shall bear the same proportion, respectively, to the whole amount they are to receive from the said parties of the first part as the corresponding payment to the said parties of the first part by the mayor, etc., bear to the whole amount they are to receive under their contract from the said mayor, etc. And it is expressly understood and mutually covenanted and agreed that in no event shall the parties of the second part look to the said parties of the first part, or hold them responsible for any payments, until the said parties of the first part are first placed in sufficient funds by the mayor, etc. (the defendants), to enable them to make such payment according to the herein last beforementioned provisions," etc.

The covenant with Kain & Morgan was read in evidence by the plaintiffs, subject to the right of the defendants to raise such objections to its admissibility, during the progress of the cause, as they might think proper. The plaintiffs also proved that they commenced the delivery of the marble in pursuance of the covenant between them and the defendants, and continued so to do until July, 1837, when the defendants suspended operations upon the building for want of funds, and refused to receive any more materials of the plaintiffs, though the latter were ready and offered to perform. The entire quantity of marble necessary to fulfill the contract on the part of the plaintiffs, according to the estimates made at the trial, was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which they were paid the contract price. The plaintiffs then had on hand, at Kain & Morgan's quarry, about 3,308 feet, which was suitably fitted and prepared for delivery. A witness swore that this was not of much value for other buildings, and would not probably bring over two shillings per foot. Other witnesses swore that, had the work progressed with ordinary diligence, it would have taken about five years to complete the contract on the part of the plaintiffs. Considerable testimony was given tending to show the cost of marble in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. And the plaintiffs offered to show "what would be the difference between the cost to them of the marble in the contract, and the price that was to be paid for it by the contract," which evidence was objected to, but the circuit judge admitted it, and the defendants excepted. The witnesses answered that in 1836 the difference would be about 20 per cent.; in 1837, from 25 to 30 per cent.; in 1838, about 25 per cent.; in 1839, from 25 to 30 per cent.; and in 1840, from 30 to 40 per cent. The witnesses also testified that the ordinary profit calculated upon by master stone cutters was from 10 to 20 per cent., and that 15 per cent. was a fair living profit. All this testimony was objected to, but the circuit judge admitted it, and the defendants again excepted.

When the plaintiffs rested, the defendants moved that all the testimony in relation to the contract of Kain & Morgan with the plaintiffs, and the contract itself, be excluded from the consideration of the jury as irrelevant, but the circuit judge overruled the motion, and the defendants excepted.

The circuit judge charged the jury, among other things, that they were to allow the plaintiffs as much as the performance of the contract would have benefited them; that the plaintiffs were entitled to recover for the unfinished marble not accepted, subject to a deduction of what should be deemed its fair market value; that the jury should confine the damages to the loss of the plaintiffs; but that the benefit or profits which they would have received from the actual performance constituted such loss. The circuit judge also charged as follows: "The defendants ought to be allowed what the jury should think just as to interest on the outlays of the plaintiffs; also what the jury might think just for the risk of transportation, and the reasonable value of the marble unaccepted and unquarried. As to damages on the rough marble to be delivered by Kain & Morgan, it appears by the contract with the defendants that the plaintiffs were obliged to procure it from this quarry. The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract; and if the defendants, by stopping the work, obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. The jury, in respect to this contract, are to give the difference between the contract price and what it would cost Kain & Morgan to deliver the article, deducting the value of it to them, and making all proper allowances as in the case of the principal contract. In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages or subsequent circumstances," etc.

The defendants excepted to the charge, and requested the circuit judge to instruct the jury, among other things, that no damages should be allowed on account of any supposed profits which the plaintiffs might have made out of the unfinished work; and that the damages allowed should be confined to the actual loss which the plaintiffs had sustained. The judge refused to charge further, and the defendants excepted. The jury found a verdict in favor of the plaintiffs for $72,999, and the defendants now moved for a new trial on a bill of exceptions.

D. Lord and C. O'Conor, for plaintiffs. B. F. Butler and G. Wood, for defendants.

NELSON, C. J. The damages for the marble on hand, ready to be delivered, were not a matter in dispute on the argument. The true measure of allowance in respect to that item was conceded to be the difference between the contract price and the market value of the article at the place of delivery. This loss the plaintiffs had actually sustained, regard being had to their rights as acquired under contract.

The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so.

The plaintiffs insist that the gains they would have realized, over and above all expenses, in case they had been allowed to perform the contract, enter into and properly constitute a part of the loss and damage occasioned by the breach; and they were accordingly permitted in the course of the trial to give evidence tending to show what amount of gains they would have realized if the contract had been carried into execution.

On the other hand, the defendants say that this claim exceeds the measure of damages allowed by the common law for the breach of an executory contract. They insist that it is simply a claim for the profits anticipated from a supposed good bargain, and that these are too uncertain, speculative, and remote to form the basis of a recovery.

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. Clare v. Maynard, 6 Adol. & E. 519, and Cox v. Walker, in the note to that case; Walker v. Moore, 10 Barn. & C. 416; Cary v. Gruman, 4 Hill, 627, 628; Chit. Cont. 458, 870.

The civil law is in accordance with this rule. "In general," says Pothier, "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs. The debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, "Damni et interesse ipsam rem non habitam." 1 Evans. Poth. 91. And see Dom. bk. 3, tit. 5, § 2, arts. 3–6.

When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed than if it had been made with one in prosperous or affluent circumstances. Dom. bk. 3, tit. 5, § 2, art. 4.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed; perhaps the only inducement to the arrangement. The parties may, indeed, have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself.

The civil law writers plainly include the loss of profits, in cases like the present, within the damages to which the complaining party is entitled. They hold that he is to be indemnified for "the loss which the non-performance of the obligation has occasioned him, and for the gain of which it has deprived him." 1 Evans, Poth. 90; Dom. bk. 3, tit. 5, § 2, arts. 6, 12. And upon looking into the common-law authorities bearing upon the question, especially the later ones, they will be found to come nearly, if not quite, up to the rule of the civil law.

In Boorman v. Nash, 9 Barn. & C. 145, it appeared that the defendant contracted in November for a quantity of oil, one-half to be delivered to him in February following, and the rest in March; but he refused to receive any part of it. And the court held that the plaintiff was entitled to the difference between the contract price and that which might have been obtained in market on the days when the contract ought to have been completed. See M'Lean v. Dunn, 4 Bing. 722. The case of Leigh v. Paterson, 8 Taunt. 540, was one in which the vendor was sued for not delivering goods December 31st, according to his contract. It appeared that in the month of October preceding he had apprised the vendee that the goods would not be delivered, at which time the market value was considerably less than December 31st. The court held that the vendee had a right to regard the contract as subsisting until December 31st, if he chose and recover the difference between the contract price, and the market value on that day. See, also, Gainsford v. Carroll, 2 Barn. & C. 624.

The above are cases, it will be seen, in which the profits of a good bargain were regarded as a legitimate item of damages, and constituted almost the only ground of recovery. And it appears to me that we have only to apply the principle of these cases to the one in hand, in order to determine the measure of damages which must govern it. The contract here is for the delivery of marble, wrought in a paticular manner, so as to be fitted for use in the erection of a certain building. The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject-matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principles which must govern, but only the mode of ascertaining the actual value of the article, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it becomes necessary; and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract at the place of delivery. If the cost equals or exceeds the contract price, the recovery will of course be nominal, but, if the contract price exceeds the cost, the difference will constitute the measure of damages.

It has been argued that inasmuch as the furnishing of the marble would have run through a period of five years,—of which about one year and a half only had expired at the time of the suspension,—the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But, in my judgment, no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.

It will be seen that we have laid altogether out of view the subcontract of Kain & Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all their subcontracts as a consequence of the breach of the principal one, and that the damages to which they may be thus subjected ought to enter into the estimate of the amount recoverable against the defendants, is too hypothetical and remote to lead to any safe or equitable result. And yet the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one, shows the injustice of restricting the damages, in cases like the present, to compensation for the work actually done, and the item of materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in fault.

If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount it be made upon a substantial basis, and not be left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital.

These views, it will be seen, when contrasted with the law as expounded and applied by the circuit judge, necessarily lead to the granting of a new trial.

BEARDSLEY, J. The circuit judge clearly erred in that part of his charge to the jury which related to the contract of the plaintiffs with Kain & Morgan. No damages are allowable on account of this contract, nor am I able to see how it can be regarded as relevant evidence upon any disputed point connected with the amount for which the defendants are liable.

The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must, therefore, ascertain what it would probably have cost them to complete the contract, over and above the materials on hand, including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfillment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

Where a vendor has agreed to sell and deliver personal property at a particular day, and fails to perform his contract, the vendee may recover in damages the difference between the contract price and the market value of the property at the time when it should have been delivered. Chit. Cont. (5th Am. Ed.) 445; Dey v. Dox, 9 Wend. 129; Gainsford v. Carroll, 2 Barn. & C. 624; Shepherd v. Hampton, 3 Wheat. 200; Quarles v. George, 23 Pick. 400; Shaw v. Nudd, 8 Pick. 9; 2 Phil. Ev. 104. So, if a person who has agreed to purchase goods at a certain price refuses to receive them, he must pay the difference between their market value and the enhanced price which he contracted to pay. 2 Starkie, Ev. (7th Am. Ed.) 1201; Boorman v. Nash, 9 Barn. & C. 145.

These principles are strictly applicable to the present case. In reason and justice there can be no difference between the damages which should be recovered for the breach of an ordinary agreement to buy or sell goods and one to procure building materials, fit them for use, and deliver them in a finished state, at a stipulated price. In neither case should the wrongdoer be allowed to profit by his wrongful act. The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. Shannon v. Comstock, 21 Wend. 461; Miller v. Mariner's Church, 7 Greenl. 51; Shaw v. Nudd, 8 Pick. 13; Swift v. Barnes, 16 Pick. 196; Royalton v. Turnpike Co., 14 Vt. 311.

The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants, but this the plaintiffs were not bound to do.

There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture, for all the data necessary to form a correct estimate of the entire expenses of executing the contract can now be furnished by witnesses.

If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages, although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. Adderly v. Dixon, 1 Sim. & S. 607, and cases there cited. In Royalton v. Turnpike Co., 14 Vt. 311, 324, an action was brought on a contract which had about twelve years to run. And the court held, in granting a new trial, that the rule of damages "should have been to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract; and thus assess the entire damages for the remaining twelve years." No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily at which prices are to be ascertained and estimated; and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market in respect to prices is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period, especially as the estimate of damages must, in any event, be somewhat conjectural.

I think the defendants are entitled to a new trial, and that the damages should be assessed upon the principles stated.

BRONSON, J. As the marble had no market value, the question of profits involves an inquiry into the cost of the rough material in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed; and this makes the question on which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule; it will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties.

New trial granted.

SHERMAN CENTER TOWN CO. v. LEONARD.

(26 Pac. 717, 46 Kan. 354.)

Supreme Court of Kansas. May 9, 1891.

Error from district court, Sherman county; LOUIS K. PRATT, Judge.

Hardy & Sterling, for plaintiff in error. Bagley & Andrews, for defendant in error.

JOHNSTON, J. Thomas P. Leonard recovered a judgment for $600 against the Sherman Center Town Company as damage for the breach of a contract. Leonard owned a hotel in Itasca, and Sherman Center, which was three miles away, was a candidate for county-seat of Sherman county. The town company, desiring to increase the population and influence of Sherman Center and strengthen its candidacy, held out inducements to the citizens of the surrounding towns to remove their buildings and establish themselves in business in Sherman Center, and unite in an effort to make that town the county-seat of the county. Accordingly they entered into an agreement with Leonard by which Leonard was to join them in building up the town, and remove his hotel from Itasca, in consideration of which the company was to convey to him certain lots in Sherman Center, and provide at its own expense men and machinery to remove the hotel, and place it over a cellar of equal size, and on a foundation of a similar kind, as it was then resting upon in Itasca. The plaintiff alleged that the company had failed and refused to remove the hotel in accordance with the terms of the contract; that the other buildings which were then situated in Itasca have been removed to Sherman Center, and the town of Itasca has become depopulated, and the business of hotel-keeping of no value; and that the hotel now stands alone, with no town nearer to it than Sherman Center, which is nearly three miles distant. He further alleged that it was a large and well-furnished hotel, and that the cost of its construction and the furniture contained therein was about $4,500. It is alleged that the cost of removal would be about the sum of $800, and that he suffered damages by the refusal of the company to comply with the contract in the sum of $1,200. He therefore asked judgment for $2,000. The company by its answer denies the execution of the contract, or that it is authorized by its charter to enter into the contract alleged to have been made.

There are several errors assigned by the company, but only one of them requires attention. It appears that the company has conveyed the lots to Leonard, as stipulated in the contract, but the hotel has not been removed, and, according to plaintiff's testimony, the non-removal is owing to the refusal of the company to furnish the men and machinery for that purpose, although frequent demands have been made upon them. In the course of the trial the plaintiff testified that, by reason of the removal of the people and their buildings from other towns, Sherman Center became a flourishing place of several hundred people, where he could have profitably carried on the hotel business, but that the town of Itasca was practically abandoned, so that he is without business, and simply remains at the hotel to protect the goods and furniture therein. In order to prove the extent of his injury, the following question was asked and allowed by the court over the objection of the defendant: "State, as near as you can, what would have been your profits, or what your damages was, in other words, by reason of the non-fulfillment of this contract,—not moving your hotel and establishing your business at Sherman Center." Another question which was allowed, over objection, was: "State what the damage was by reason of them not moving your hotel to Sherman Center, as they agreed to, in money." He answered that the loss or profits would have been $150 a month, and that the total damage sustained by reason of not having the hotel located at Sherman Center, besides the cost of moving the building, was from $1,200 to $1,500, and that it would cost about $800 to move the building. The questions asked were objectionable, and the testimony given was inadmissible, upon two grounds: First, the questions were objectionable because they did not call for specific facts, but permitted the witness to state a mere opinion, giving in the lump the amount of damages thought to be sustained. It is the function of the court or jury trying the case to determine from evidence properly presented what the amount of damages sustained is, and, while it might be very convenient for the plaintiff to permit him and his witnesses to give the damages suffered in a lump, it would be a very unsafe practice to allow them to state the amount of damages supposed to be sustained, without regard to the facts or knowledge upon which their opinions were based. It is well settled that the practice is not permissible. Roberts v. Commissioners, 21 Kan. 248; Railroad Co. v. Kuhn, 38 Kan. 675, 17 Pac. Rep. 322; Town Co. v. Morris, 39 Kan. 377, 18 Pac. Rep. 230; Railway Co. v. Neiman, 45 Kan. 533, 25 Pac. 22. Then, again, the prospective profits that he lost by the breach of the contract are too remote, uncertain, and speculative to be recoverable. Who can tell what the future gains of the hotel business would have been in Sherman Center, if he had moved there? His past profits in Itasca were not shown, and there is no testimony of the gains of others established in the same business at Sherman Center. How, then, does Leonard know that the profits would have been $150 per month? The gains to be derived from the business depended upon many contingencies other than the mere removal of his hotel to that place. The growth of the town; the location of the county-seat there or at another town near by; the immigration and travel; the competition in the hotel business; the price of provisions and the cost of help; the general reputation of the house; and the popularity of the landlord with the traveling public and the people of that community,—are suggested as some of the considerations that would affect the anticipated benefits. Where the breach of a contract results in the loss of definite profits, which are ascertainable, and were within the contemplation of the contracting parties, they may generally be recovered; but the prospective profits do not furnish the correct measure of damages in the present case. Aside from the remote, conjectural, and speculative character of the anticipated benefits, it cannot be said that the loss of them is the direct and unavoidable consequence of the breach. The plaintiff could not sit idle an indefinite length of time, and safely count on the recovery of $150 per month as damages. If there was a breach of the contract, it was his duty, upon learning of it, to at once remove the building, or employ others to do so, and charge the cost of the removal to the town company. The law requires that the injured party shall do whatever he reasonably can, and improve all reasonable opportunities to lessen the injury. From the testimony it appears that Leonard could have procured others to move the hotel; and in such a case the ordinary measure of damages is the cost of removal, and the reasonable expenses of avoiding the consequence of the defendant's wrong. Railway Co. v. Mihlman, 17 Kan. 224; Loker v. Damon, 17 Pick. 284; 1 Sedg. Dam. 165, and cases cited. Counsel for plaintiff in error say that no more than the cost of removal was allowed by the court; but the admission of the objectionable evidence, against the opposition of the plaintiff in error, would indicate that the court adopted an incorrect measure of damages, and did not limit the recovery to the expense of the removal. The liability of the plaintiff in error for any loss is not conceded. It is shown in the testimony that soon after the time for the removal of the building the people of Sherman Center abandoned the attempt to obtain the county-seat, and all or nearly all of them moved to another place. It is claimed by plaintiff in error that Leonard objected to the removal of his building until the question of the location of the county-seat was settled. He testified at the trial that he did not intend to move the building to Sherman Center, and that he would not move the building at all, until the county-seat was permanently located. If the non-removal of the building was due to the fault of Leonard, he is not entitled to recover anything. This is a disputed question of fact, which must be settled on another trial. For the error of the court in admitting testimony the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

THOMAS, BADGLEY & W. MANUF'G CO. v. WABASH, ST. L. & P. RY. CO.

(22 N. W. 827, 62 Wis. 642.)

Supreme Court of Wisconsin. March 31, 1885.

Appeal from circuit court, Milwaukee county.

Chapin, Dey & Friend, for appellant. Van Dyke & Van Dyke, for respondent.

COLE, C. J. On the tenth of November, 1882, the plaintiff, as consignee, caused to be delivered to the defendant, a common carrier, at St. Louis, a pipe-machine, circular shaft, box of dies, and wrenches accompanying, and being a part of the pipe-machine, to be transported over its road and connecting lines to Milwaukee. The machine and its attachments were badly broken and destroyed while in the custody of the defendant through the negligence of its servants. The machine was a patented one, and the right to make and sell it was vested in the manufacturer at St. Louis, of whom it was purchased by the plaintiff. The machine was devised for cutting pipe and making nipples, and was ordered by the plaintiff to be used in its business in Milwaukee, of fitting pipe and manufacturing brass goods, etc. The plaintiff sues to recover damages for the loss of the machine, and the loss of its use in its business while another was being procured. The case was tried by a jury, which found a special verdict. The plaintiff had judgment for the value of the machine, which was proven to be $275, and for the loss of its use for 85 days, at the rate of $1.50 per day, and interest thereon from the commencement of the action.

The questions presented on the appeal are as to the proper rule of damages. There was evidence which tended to show that the machine, though badly broken and some of its parts destroyed, might have been repaired by the patentee at St. Louis, who was the manufacturer. The plaintiff refused to accept the machine at Milwaukee, but left it in the possession of the carrier, and ordered a new machine of the manufacturer. One question arising in the record is whether it was the duty of the plaintiff, under the circumstances, to have received the machine in its damaged condition, and to have made proper and reasonable exertions to have it repaired, so as to render the loss to the carrier as light as possible. There is a class of cases which decide that it is not only the moral but the legal duty of a party who seeks redress for another's wrong, to make use of his opportunities of lessening the damage caused by the other's default. If it had been within the power of the plaintiff to have supplied the broken parts of the machine, or to have repaired it with reasonable labor and expense, it might have been its duty to have done so within this rule of law. But the jury found that the machine when delivered was useless; that the cost and expense to the plaintiff to repair it would have amounted to the price of a new machine. This finding is criticised by the counsel for the defendant, but we are not inclined to disturb it.

As we have said, the machine was a patented one; its parts were not kept for sale in the open market; and there was evidence that it would cost any one but the manufacturer more to make the patterns for the castings than the price of a new machine. The plaintiff, therefore, could not have had the machine repaired in Milwaukee at any saving to the carrier. But it is said it might have returned the machine to the manufacturer in St. Louis, who testified that it could have been repaired for $75. True, the manufacturer, in answer to this hypothetical question, namely, "Supposing the bottom part of the machine was broken in two pieces, the attachments consisting of a box of dies broken open and contents scattered in the car, oil-cup on the machine burst, skids on which machine and attachments were originally placed broken, legs on standard of machine broken, and rods connected with them bent, what was the damage, in your estimation, to the machine?"—the witness said the question was a difficult one to answer, but added, as we understand him, that if the damages supposed included all that was done to the machine, and none of the parts were missing, and no other injury was done to it, then it would cost about $75 to repair it. But the witness subsequently modified his statements upon this point by saying that with the fragments of the machine which he received from the defendant, it would cost not less than $250 to repair it. It appeared that some of the most expensive parts were missing, and in the state of the proof the jury might well find, as they did, that the cost and expense to the plaintiff at the time to have the machine repaired by the manufacturer, and the broken parts replaced, would be as much as the price of a new machine. It is very clear that the machine in its damaged condition was of no value to the plaintiff. It was not a case of a partial but of a total loss, so far as plaintiff was concerned. The general rule of damages for the loss of goods by a carrier, where it is liable for such loss, is the value of the goods at the destination to which it undertook to carry them, with interest on such value from the time when the goods should have been delivered. Nudd v. Wells, 11 Wis. 408; 2 Sedg. Dam. 94, note b; Hutch. Carr. § 769.

The plaintiff did not claim to recover more for the machine than it had paid for it at St. Louis, to-wit, $275. It appeared that it had paid the freight, $3.85, which of course should be added to the recovery. So our conclusion upon this branch of the case is that the court below was right in allowing the plaintiff to recover upon the verdict the cost of the machine. There was a stipulation in the bill of lading that in case of loss or damage to goods during transportation, whereby the defendant incurred a responsibility, that then it should only be liable for the value of the property computed at the place and time of shipment. This was precisely the extent of the recovery on this item of damages.

The next question is, was the plaintiff entitled to recover for the loss of the use of the machine while another was being procured to supply the place of the one destroyed? This question, upon the circumstances of this case, we think must be answered in the negative. In the first place, it is to be observed that there is no allegation in the complaint, and no proof was give on the part of the plaintiff, which tended to show that the defendant had notice of the use to which the machine was to be put, or even knew that the plaintiff intended to use it in its business. On the contrary, the agent of the defendant who made the contract of shipment says he had no notice of the purpose for which the machinery was to be used. He said he was applied to by the manufacturer in St. Louis about this particular shipment, and gave special rates, less than the regular tariff, on representation made by the manufacturer that the goods were not liable to injury, and that he wanted to introduce the machine, which was a new one, through the west, and wished the assistance of the witness in doing so. This is all the knowledge the defendant had about the property, or the use to which it was to be put. It is said the fact that the consignee in the bill of lading was a manufacturing company was sufficient notice that the machine was intended to be used by it in its business. We do not think so. The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume—as we have no right to do—that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use.

This being the state of the evidence, on what ground can the plaintiff claim damages for loss in the use of the machine? The president of the plaintiff testified that his company was doing business of steam-fitting and selling pipe at wholesale, and in the fall of 1882 he was told he would need a machine to cut the pipe. This was the reason for buying the machine. He says: "We were, besides, doing some steam-fitting ourselves, and, of course, we have to cut pipe all the time to get special lengths, and instead of using men we paid a man to do it with the machine. The machine would do the work of one man." This is really all there is in the case to base a claim for loss in the use of the machine upon. The defendant did not know what the machine was designed for; did not know the use to which it was to be put; did not even know the plaintiff would use it; and, of course, did not know that the plaintiff would sustain any special damage if the property failed to be delivered promptly, in good order. From the nature of the subject it is difficult to state an inflexible rule of damages which will apply to all contracts. This court has often referred to, and has practically acted upon, the rule laid down in the leading case of Hadley v. Baxendale, 9 Exch. 341. In that case the plaintiffs, who were owners of a flour-mill, sent a broken iron shaft to an office of the defendant, a common carrier, to be conveyed to the consignee, to have a new shaft made. The defendant's clerk was told that plaintiff's mill was stopped, and that the broken shaft must be delivered immediately to the consignee, but it was delayed for an unreasonable time. In consequence of the delay the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were unable to work their mill for want of the new shaft, and thereby incurred a loss of profits. The court held that under the circumstances such loss could not be recovered in an action against the common carrier, because the special circumstances were never communicated to it by the plaintiffs. Alderson, B., in giving the decision, states the rule of damages as follows:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract."

This rule has been sometimes criticised, and it has been said that, generally, when parties enter into a contract, they do not contemplate its breach or the probable result of a breach, and that the rule might be more accurately expressed. See Palles, C. B., in Hamilton v. McGill, 12 Ir. Law, 202. But, without refining on the rule, its application to the question we are considering is obvious and decisive; for here the defendant was not informed by the plaintiff that the machine was one which it needed for use in its business of cutting and fitting pipe, and that it was procured for that purpose. If one desires to trace the judicial discussion of the rule in Hadley v. Baxendale, he will find a most excellent and accurate analysis of the English and American decisions in note a, 1 Sedg. Dam. (7th Ed.) top p. 218. Also see note 2 to section 772, Hutch. Carr. p. 597.

In Brayton v. Chase, 3 Wis. 456, which was an action by the vendee against the vendor for failure to deliver a reaper which the plaintiff purchased to harvest his crops, the plaintiff sought to prove that he suffered great loss and damage in his crops, and in the extra expense of hiring hands, by reason of the non-fulfillment of the contract to deliver. The evidence was excluded, and this court affirmed the ruling, holding that such damages did not result naturally and directly from the injury complained of. It may be doubtful whether this decision is entirely consistent with Richardson v. Chynoweth, 26 Wis. 656; Smeed v. Foord, 1 El. & El. 602; Gee v. Railway Co. 6 Hurl. & N. 211; Collard v. Railway Co. 7 Hurl. & N. 79; Elbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473; Wilson v. Railway Co. 9 C. B. (N. S.) 632; Griffin v. Colver, 16 N. Y. 490; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; and cases of that class. For, as we understand the Brayton Case, the vendor knew that the reaper was wanted for the purpose of harvesting the plaintiff's crop that season. If it were not delivered in time for that purpose the parties might well be presumed to have known that the vendee would be put to additional expense in securing his crops. But still the case is fully supported by British Columbia Saw-mill Co. v. Nettleship, L. R. 3 C. P. 499. In this case "the plaintiffs delivered to the defendant's servants, on a quay at Glasgow, for shipment on board the defendant's vessel, which lay along-side, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's island. The master gave a bill of lading for them, describing the cases as containing "merchandise." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost article. Held, that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board. Held, also, that the measure of damages for the breach of the contract was the cost of replacing the lost articles in Vancouver's island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay."

But we deem it unnecessary to pursue this discussion further. The case of Brown v. Railway Co. 54 Wis. 342, S. C. 11 N. W. 356, 911, is referred to by plaintiff's counsel to sustain the claim for damages for loss of the use of the machine; but that was a case for a personal injury and has no application to this case. We have already said that the jury found that the machine was so damaged, while in the custody of the defendant as carrier, as to be entirely useless to the plaintiff. The plaintiff is therefore entitled to recover the value of the machine, found to be $275, including the freight paid by plaintiff of $3.85, and interest on this amount from November 22, 1882, the time the property reached its destination.

BY THE COURT. The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment on the verdict in accordance with this opinion.

BRIGHAM et al. v. CARLISLE.

(78 Ala. 243.)

Supreme Court of Alabama. Dec. Term, 1884.

Appeal from circuit court, Lee county; Henry D. Clayton, Judge.

Action against Brigham & Co. for breach of a contract employing plaintiff as a traveling salesman to sell goods on commission. There was a judgment for plaintiff, from which defendants appealed.

J. M. Chilton, for appellants. W. H. Barnes, contra.

CLOPTON, J. It may be conceded that at common law a defendant can insist upon the benefit of the statute of frauds by plea of the general issue. Under our statute, which provides that "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff he may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense." The statute of frauds must be pleaded, or it will be considered as waived. Ritch v. Thornton, 65 Ala. 309; Petty v. Dill, 53 Ala. 641. No plea of the statute of frauds having been interposed, the validity of the contract, because not in writing, cannot be raised by a charge.

If the statute had been pleaded, the contract, as set out in the bill of exceptions, does not come within its inhibition. It was made in September, 1881, and, as testified by the plaintiff, was to commence on the 1st of October, and continue at least eight months, and longer if mutually desirable at the end of that time. By its terms it was capable of performance within a year. The statute applies to contracts which, by express stipulation, are not to be performed within one year from the making thereof, and not to contracts which by their terms are determinate within that period, but may be continued longer at the option of the parties. Heflin v. Milton, 69 Ala. 354.

The third charge requested by the defendants based their right to abandon the contract on the naked fact, unexplained, that the plaintiff did not commence the performance of the contract until January 1, 1882. The violation of a contract by one of the parties, or when he is unable to perform the acts or services stipulated, may be sufficient to authorize the other party to abandon it. Sickness of the plaintiff for a protracted period, such as would probably have disabled him from making sales during the appropriate season, as contemplated and intended by the contract, might perhaps have authorized the defendants to abandon the contract; but there was no implied condition that the plaintiff would continue in health. Its abandonment in such case is at the election of the defendants; and they will be held to have waived their right to renounce the contract when, after the delay has terminated, they regard and treat it as continuing and in force. Stewart v. Cross, 66 Ala. 22. The charge requested by the defendants ignored the material facts: the detention of the plaintiff by sickness in New York until near the end of November; the letter of the defendants of December 12th, in reply to one from the plaintiff, in which they stated samples would be furnished him during the week, and cautioning him as to the credit of certain firms, and samples having been actually sent to him late in December; which facts there was evidence tending to prove. Whilst a party has the right to require an instruction as to the legal effect of the evidence, when, conceding all adverse inferences from the conflicting evidence, the undisputed facts establish a legal conclusion in his favor, a charge is properly refused which asserts a legal proposition, based on certain specified facts, but ignores other facts, which there is evidence tending to prove, showing the incorrectness of the legal conclusion asserted in the charge.

The burden of proof is on the party having the affirmative of the particular issue. Pleas of payment and set-off were filed by defendants, and the onus of establishing their truth was on them. The legal effect of the second charge requested by the defendants is to instruct the jury, if they found the evidence in equilibrium on any or all the issues presented, which includes the issues of payment and set-off, to find for the defendants. Being calculated to mislead, it was properly refused.

The material question is the measure of damages. The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of a contract; though there are exceptional cases in which exemplary or punitive damages are allowed. Owing to the ever-occurring differences in the circumstances, and in the special conditions of the contracting parties, it has been found difficult, if not impossible, to lay down general and definite rules as to the measure of damages, applicable to all cases of a class. From a misconstruction of expressions of eminent jurists, not sufficiently guarded for general use, but adapted to the case in hand, the applications of rules commonly recognized have been as various as the cases. The proposition that all damages are recoverable which are in the contemplation of the parties, is not strictly correct. The primary rules are, the damages must be the natural and proximate results of the wrong complained of, and must not be merely speculative or conjectural. These must concur, though founded on different principles, and are distinct and independent of each other. The law presumes that a party foresees the natural and proximate results of a breach of his contract or tort, and hence these are presumed to be in his legal contemplation. For such damages, as a general rule, the party at fault is liable.

But there are damages, which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequence of the breach of a contract, and yet all profits are not within the scope of recoverable damages. There are numerous cases, however, in which profits constitute, not only an element, but the measure, of damage. While the line of demarcation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent of the contract, their loss the natural result of its breach, and the amount can be estimated with reasonable certainty,—such certainty as satisfies the mind of a prudent and impartial person,—they are allowed. The requisite to their allowance is some standard, as regular market values, or other established data, by reference to which the amount may be satisfactorily ascertained. Illustrations of profits recoverable are found in cases of sales of personal property at a fixed price, evictions of tenants by landlords, articles of partnership, and many commercial contracts.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot, under any circumstances, be brought within the range of recoverable damages." 1 Suth. Dam. 141. Profits speculative, conjectural or remote are not, generally, regarded as an element in estimating the damages. In Pollock v. Gantt, 69 Ala. 373, it is said: "What are termed 'speculative damages'—that is, possible, or even probable, gains, that it is claimed would have been realized but for the tortious act or breach of contract charged against a defendant—are too remote, and cannot be recovered." The same rule has been repeatedly asserted by this court. Culver v. Hill, 68 Ala. 66; Higgins v. Mansfield, 62 Ala. 267; Burton v. Holley, 29 Ala. 318; White v. Miller, 71 N. Y. 118; French v. Ramge, 2 Neb. 254; 2 Smith, Lead. Cas. 574; Olmstead v. Burke, 25 Ill. 86. The two following cases may serve to illustrate the difference between profits recoverable and not recoverable. In Insurance Co. v. Noxsom, 84 Ind. 347, an insurance agent, who had been discharged without cause before the expiration of his contract, was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation due on such renewals can be ascertained with requisite certainty by the use of actuary's life tables and comparisons, and that the basis of the right to damages existed, and was not to be built in the future. In Lewis v. Insurance Co., 61 Mo. 534, which is cited with approval in the other case, the same rule as to the probable value of renewals was held; but it was also held that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commissions before the breach of the contract, in the absence of other proof, is too speculative to be admissible.

Profits are not excluded from recovery because they are profits; but, when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts and the findings of juries should be based. The amount is not susceptible of proof. In 3 Suth. Dam. 157, the author discriminatingly observes: "When it is advisedly said that profits are uncertain and speculative, and cannot be recovered, when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent, and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore it is more a general truth than a general principle that a loss of profits is no ground on which damages can be given." When not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others on the presumption that they are not in the legal contemplation of the parties.

The plaintiff, by the contract, undertook the business of traveling salesman for the defendants. The amount of his commissions depended, not merely on the number and amounts of sales he might make, but also on the proportional quantity of the two classes of goods sold, his commissions being different on each. The number and amounts of sales depended on many contingencies,—the state of trade, the demand for such goods, their suitableness to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of his sales by the defendants. There are no criteria, no established data, by reference to which the profits are capable of any estimate. They are purely speculative and conjectural. Besides, the evidence is the mere opinion and conjecture of the plaintiff, without giving any facts on which it was based. The bare statement, uncorroborated by any facts, and without a basis, that "the reasonable sales would have been fifteen thousand dollars, and that the net profits on that amount of sales would have been four hundred and fifty dollars," is too conjectural to be admissible. Washburn v. Hubbard, 10 Lans. 11.

Reversed and remanded.

HITCHCOCK v. SUPREME TENT OF KNIGHTS OF MACCABEES OF THE WORLD.

(58 N. W. 640, 100 Mich. 40.)

Supreme Court of Michigan. April 10, 1894.

Error to circuit court, Saginaw county; John A. Edget, Judge.

Action by Edward M. Hitchcock against the Supreme Tent of the Knights of Maccabees of the World. From a judgment in his favor, plaintiff brings error on account of insufficiency. Reversed.

The defendant is a corporation organized under the laws of this state, and authorized to issue endowment certificates, payable on the death of members, to beneficiaries selected by them, and is operated under the lodge system, the lodges being known as "tents." It was incorporated in 1885 by five incorporators, three of whom constituted the board of trustees. A Mr. Boynton was secretary and one of the trustees, and to him was committed the chief management of the association. The organization appears to have met with great favor, and before the close of the first year was in active operation in many states and in Canada. It had from 50 to 75 agents engaged in organizing tents. These agents were compensated by a part of a membership fee, a certificate fee, and a quarterly per capita tax. No tents could be instituted with less than 15 members in places of 5,000 population, or with less than 25 members in places of over 5,000 population. Plaintiff was a man of considerable experience in organizing associations of this character. Negotiations between him and Mr. Boynton resulted in the execution of a contract dated October 5, 1885, by which plaintiff was given the sole control of instituting and organizing new tents or subordinate bodies in the state of Indiana. The contract fixed the following compensation for his services: "First. Sixty dollars of the charter fee for each tent he or his deputies may institute in said state of Indiana. Second. All the membership fee on all over fifteen, and under twenty-five, members put in new tents on organization. Third. One-half the membership fee on all members put into new tents on organization, over twenty-five members. Fourth. All the per capita tax collected by him from the first fifteen members in each new tent. Fifth. One-fourth of the annual per capita tax on the entire membership in the state of Indiana shown to be in good standing on the books of the supreme tent at the close of each quarterly term, the said money to be paid to the said Hitchcock within thirty days thereafter. Sixth. He shall also receive as compensation for visiting organized tents within the state, with a view of building them up and increasing their membership, all the quarterly per capita tax paid in by new members secured in such work, and also such portion of the membership fee as may be agreed upon between him and the tents. The aforesaid proportion of charter fee, membership fee, per capita tax, etc., shall be full and complete compensation for such services." It provided, further, that plaintiff should give his full time and services to the work, and execute a good and sufficient bond, in the sum of $500, for the faithful performance of his duties, and the turning over all moneys belonging to the supreme tent. It also contained the following provisions: "It is further agreed between the parties hereto that, whenever a great camp is organized in said state, then this agreement shall be null and void, and of no binding force. It is also agreed that, whenever either party to this agreement desires to cancel the same, at least thirty days' notice must be given by the party so electing. This agreement cannot be canceled without the consent of all parties to the contract." No great camp could be organized in any state until there were at least 50 tents and 2,000 members. Plaintiff furnished his bond, received his commission, and immediately entered upon the work. In 13 months he had organized 10 tents, with a total membership of 286. The defendant then broke the contract, early in 1887, and demanded a surrender of plaintiff's original commission, which he refused, and then left its employ. The defendant immediately placed other agents in the state, who established 40 tents, and brought the membership up to a sufficient number to establish a great camp. Upon the trial the learned circuit judge directed a verdict for the plaintiff, under clause 5, for one-fourth of the annual per capita tax paid in by the members of the 10 tents which he organized, and who continued as members, which, with interest, amounted to $454.25. As to the other damages claimed, the judge held that they were speculative, that there were no certain data from which they could be computed, that they were uncertain of ascertainment, and directed a verdict for the defendant.

Rowland Connor, for appellant. McDonell & Hall, for appellee.

GRANT, J. (after stating the facts). All questions arising under this contract, except that of damages, have been determined in favor of plaintiff by the verdict and judgment. From this determination, defendant has not appealed. The only question, therefore, before this court, is the ruling of the court below as to the measure of the damages. Plaintiff insists that he introduced and offered evidence from which the jury might, with reasonable certainty, determine the profits which he might have made, but which were lost to him by the violation of the contract. He gave evidence tending to show the profits made on the contract while he was engaged in the work. He offered to show that the first labor of starting the enterprise is more expensive than that which follows, and that after the work is fairly started it is easier to organize tents than at first. He also offered a statement taken from the books of the defendant, showing the organization of 40 tents after the breach of the contract; 125 members in new tents, over 15 and under 25; 66 members in new tents, over 25; and the total number of new members. From this statement he made up his total claim, as follows: Charter fees, 40 tents, $2,400; membership fees under clause 2 of the contract, $625; membership fees under clause 3, $165; per capita tax under clause 4, $300; per capita tax under clause 5, $2,956.83.

The rule governing these cases is established by an unbroken line of authorities,—that damages which are purely speculative in character, and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable. The difficulty lies in determining whether the facts of a particular case bring it within or without this rule. There is no sounder basis for damages for breach of contracts of this character than the profits, when they can be determined with proximate and reasonable certainty. In fact, there is no other basis. They are the natural and proximate results of a breach, which the law presumes that each party foresees. The rule does not require that such data be furnished that they can be computed with mathematical exactness. When one breaks a contract which the other party has partly performed, and the violator then performs the work himself, from which he has reaped the profits which the other party might have made, he cannot escape liability for damages, if such other party can show the profits made while he was executing it, and the benefits received from its subsequent completion. The contract in this case was specific and definite in all respects, fixing the amount of work, and the price. It was contemplated that the plaintiff should make profits, and the defendant was to be benefited by his work. These results were being successfully accomplished when the contract was broken. In case of a breach by plaintiff, defendant could perform the work, and recover as damages the difference between the price agreed upon and the cost of completion. In case of a breach by defendant, the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment. There is no presumption, legal or otherwise, that the plaintiff could not have completed the work. The defendant was satisfied with the success of the plaintiff. It is a fair presumption that he would have succeeded. It is a fair inference from the evidence that the defendant's officers broke the contract because of this success, and the belief that they could secure the accomplishment of the work cheaper, which they in fact did. The defendant took advantage of the work which the plaintiff had done, and completed it. The defendant may not now say, "It is true I completed the work, but there is no certainty you could." This is not a case where one party agrees to sell goods for another for a year, to receive as compensation his share of the profits made; but it is a case where one agrees to sell a certain amount of goods, with no limit as to time, at a given price, and for a given compensation, and also where the goods have been sold at the same price within the agreed territory, and within the time contemplated. It has been demonstrated, not only that the work could be, but that it has been, done. It is a fair inference that it could have been done as well by the plaintiff as by the defendant. One element of damage is established by the contract, and the evidence from the defendant's own books, viz. the amount agreed to be paid, and the benefits reaped by it. The only other element is the cost of doing the work, which, deducted from the amount to be paid, would establish the profits. The expense of what plaintiff did is some evidence upon which to base a judgment of the expense of doing the rest of the work. If that be the only evidence as to the cost, and plaintiff can establish by experience that it is more difficult and expensive to accomplish the first part of the work than the last part, defendant cannot complain if the jury take that as a basis to determine the cost. On the contrary, such basis would be favorable to the defendant; and, if this were the only basis, we think, under the circumstances of this case, it was sufficient to justify a submission of the case to the jury. He who breaks his contract may not deny to the injured party the fair inferences to be drawn from the part performed. In Bagley v. Smith, 10 N. Y. 489, one partner sued another for breach of the partnership articles, and recovered profits lost by the unauthorized dissolution. The court says: "The loss of profits is one of the common grounds, and the amount of profits one of the common measures, of the damages to be given upon a breach of contract. It is very true that there is great difficulty in making an accurate estimate of future profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it Nor are we the more inclined to refuse to make inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendant which has rendered it necessary." A review of the vast number of authorities upon this subject would involve a critical statement of the facts of each case, and the writing of an opinion of unnecessary length. It is sufficient to say that we think this case comes within, and is ruled by, the following authorities: Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264; Treat v. Hiles (Wis.) 50 N. W. 896; Mueller v. Spring Co., 88 Mich. 390, 50 N. W. 319; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609. The case of Wakeman v. Manufacturing Co. is similar in its facts to the present case, and many of the authorities are there collated and discussed. Judgment reversed, and new trial ordered. The other justices concurred.

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ALLISON v. CHANDLER.

(11 Mich. 542.)

Supreme Court of Michigan. Oct. 20, 1863.

Error to circuit court, Wayne county.

C. I. Walker, for plaintiff in error. Jerome & Swift and A. B. Maynard, for defendant in error.

CHRISTIANCY, J. When this cause was formerly before us (Chandler v. Allison, 10 Mich. 460), one of the questions involved was whether Allison, the plaintiff, was rightfully in possession of the store at the time the trespass was committed, or whether his right of possession was dependent upon Chandler's election to rebuild, and ceased when that election was made; and one of the grounds upon which the judgment in that case was reversed was the rejection of evidence tending to show that Allison's right of possession was thus qualified. But as the case now appears before us upon exceptions taken on the new trial, the finding of the jury, whether right or wrong,—no exception having been taken to the evidence or the charge upon this point,—requires us to treat this question, so far as we are now to consider the case, as settled in favor of the plaintiff; and the defendant must be considered as a trespasser, entering upon the premises and tearing down the store while in the rightful possession of the plaintiff, under a lease for a term which would not expire till the 1st day of May following.

The only question presented by the present bill of exceptions, and not already disposed of by our former decision, is the question of damages; and in this action of trespass (as parties are under no necessity of protecting themselves by contract against trespasses) the question of damages is to be treated in all respects as it would have been had the trespass been committed by a party between whom and the plaintiff the relation of landlord and tenant did not exist, except so far as the good faith of the defendant, and the absence of malice on his part, might preclude the plaintiff from the recovery of damages of a punitory and exemplary character, beyond the amount which would compensate the actual loss. Upon this point (the question of exemplary damages) we think the court below was right in instructing the jury that, if they should find the defendant, in tearing down the store, acted in good faith, and under an honest belief that he had a legal right to do so, then the plaintiff could only recover his actual damages. This qualification of the right of a jury to give punitory or exemplary damages in actions of trespass is, we think, in accordance with the principle upon which such damages are sometimes allowed to be given. But whether the rulings of the court upon the admission of evidence, and in the charge to the jury, did not lay down too narrow a rule for the estimation of actual damages, is the main question for our consideration.

While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter, and the peculiar circumstances, it is very difficult—and in some cases impossible—to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the injury must be left wholly, or in great part, unredressed, or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and instructions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. We have carefully examined all the cases cited in the very elaborate briefs of the respective counsel, and the most approved elementary treatises upon the subject, and, without attempting here to compare and analyze them (which would require a treatise), we are compelled to say that the line of mere authority upon questions of damages like that here presented, if any such line can be traced through the conflict of hostile decisions, is too confused and tortuous to guide us to a safe or satisfactory result, without resort to the principles of natural justice and sound policy which underlie these questions, and which have sometimes been overlooked, or obscured by artificial distinctions and arbitrary rules.

The principle of compensation for the loss or injury sustained is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort. We do not here speak of those actions in which punitory or exemplary damages may be given, nor of those whose principal object is the establishment of a right, where merely nominal damages are proper. But, with these exceptions, the only just theory of an action for damages, and its primary object, would seem to be that the damages to be recovered should compensate the loss or injury sustained. We concur entirely with the court of appeals in New York in Griffin v. Colver, 10 N. Y. 492, in repudiating the doctrine adopted by Mr. Sedgwick from Domat (Sedgw. Dam. 3, 37, 38, etc.), that "the law aims not at the satisfaction, but the division of the loss." Such, it is true, is often the result of an action, but never the object of the law. The law may, and often does, fail of doing complete justice, from the imperfection of its means of ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design. Such a doctrine would tend not only to make the law itself odious, but to corrupt its administration, by fostering a disregard of the just rights of parties. In actions upon contract, especially, and those nominally in tort, but substantially upon contract, courts have thought it generally safer, upon the whole, to adopt certain definite rules for the government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule, than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion, or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen to present, and as might approximate compensation, and to frame thereon rules of law for the measurement of damages, though it might be evident that further damages must have been suffered, which however, could only be estimated as matter of opinion, and must therefore be excluded under the rules thus adopted. And it is not to be denied that this course of decision has sometimes been extended to actions purely of tort.

But whatever plausibility there may be in the theory of Mr. Sedgwick when applied to actions upon contract,—a plausibility which arises from mistaking the result for the object,—the injustice of such a principle, when applied to cases of actual, positive tort, like that here in question, would be so gross as to shock all sense of justice.

It has been frequently said that the rule of damages, where there is no fraud, willful negligence, malice, oppression, etc., is the same in actions of tort as in those upon contract. But though the remark is doubtless true in its application to those cases of tort where, from the nature of the case, elements of certainty exist, by which substantial compensation may be readily estimated, and other cases which are but nominally in tort, we do not think it can be accepted as a principle of universal application; nor, in our opinion, can it be justly applied to any case of actual, aggressive tort, where, from the nature and circumstances of the case itself, no such elements of certainty are found to exist, or none which will apply substantially to the whole case; nor to any case where the rule applicable to breaches of contract would exclude a material portion of the damages the injured party may have suffered, though the amount of the latter may not be capable of accurate calculation by any fixed and definite rule.

There are some important considerations which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained can not be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

Again, in the majority of cases upon contract, there is little difficulty, from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulation, or the subject-matter, the actual damages resulting from a breach, are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured, in case of a breach; and if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted.

Again, in analogy to the rule that contracts should be construed as understood and assented to by the parties,—if not as a part of that rule,—damages which are the natural, and, under the circumstances, the direct and necessary result of the breach, are often very properly rejected, because they cannot fairly be considered as having been within the contemplation of the respective parties at the time of entering into the contract.

None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he received any consideration, or chance of benefit or advantage, for the assumption of such hazard; nor has the wrongdoer given any consideration, nor assumed any risk, in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrongdoer might take or injure his property or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it, and upon every principle of justice he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume, not simply to divide this risk, which would be thus far unjust, but to relieve the wrongdoer from it entirely, and throw the whole upon the innocent and injured party? Must not such a course of decision tend to encourage trespasses, and operate as an inducement for parties to right themselves by violence, in cases like the present?

Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation,—to say nothing of justice,—does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion, and only a portion, of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it; and so far as it excludes all damages which cannot be measured by it perpetrates positive injustice under the pretense of administering justice.

The law does not require impossibilities, and cannot, therefore, require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.

In the adoption of this course it will seldom happen that the court, hearing the evidence, will not thereby possess the means of forming a satisfactory judgment whether the damages are unreasonable or exorbitant; and, if satisfied they are so, the court have always the power to set aside the verdict and grant a new trial.

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum —or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others for the balance of the term would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year, and he is ousted from the premises, and this business entirely broken up for the balance of the term, can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for the business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business"; "his customers did not come to the new store, and there was not so much of a thoroughfare by it,—not one-quarter of the travel; and he relied much upon chance custom, especially in the watch-reparing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point, also, was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury, as well as after, not only might, but should be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain or profit arising from it, which constitutes its value.

But it is insisted that loss of profits constitutes no proper ground or element of damages. If there be any such rule of law it is certainly not a universal, and can hardly be called a general, rule. Decisions, it is true, may be found which seem to take it for granted that the rule is universal. But there are numerous cases, even for breach of contract, in which profits have been properly held to constitute not only an element, but a measure (and sometimes the only measure), of damages, as in Masterton v. Mayor, 7 Hill, 61; Railroad Co. v. Howard, 13 How. 344. And in actions for breach of contract in not delivering goods (as wheat or other articles) having a marketable value, as well as in most actions of trespass or trover for the taking or conversion of such property,—wherever the difference between the contract price, or the market value at the time of taking or conversion, and the higher market value at any subsequent period, is held to constitute the damages,—in all such cases this difference of price is but another name for profits, and is yet very properly held to be a measure of damages. There is nothing, therefore, in the nature of profits, as such, which prevents their allowance as damages. But in many, and perhaps the majority, of cases upon contract in which the question has arisen, they have been held to be too remote or dependent upon too many contingencies to be calculated with reasonable certainty, or to have been within the contemplation of the parties at the time of entering into the contract.

But there are also cases for breach of contract where, though the profits were in their nature somewhat uncertain and contingent (and in most of them quite as much so as in the present case), they were yet held to constitute, not strictly a measure, but an element of damages proper for the consideration of a jury to enable them to form a judgment or probable estimate of the damages;

as in McNeill v. Reid, 9 Bing. 68; Bagley v. Smith, 10 N. Y. 489; Gale v. Leckie, 2 Starkie, 107; Ward v. Smith, 11 Price, 19; Driggs v. Dwight, 17 Wend. 71. And see Passenger v. Thorburn, 35 Barb. 17. And in Waters v. Towers, 20 Eng. Law & Eq. 410, the jury were allowed to take into consideration the profits which might have been made upon a collateral contract, though void by the statute of frauds (and see McNeill v. Reid, supra), while by the American authorities profits of this description have been almost uniformly rejected. But whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost should prevail in actions purely of tort (excepting perhaps the action of trover). Not that they should be allowed in all cases without distinction, for there are some cases where they might, in their nature, be too entirely remote, speculative, or contingent to form any reliable basis for a probable opinion. And perhaps the decisions which have excluded the anticipated profits of a voyage broken up by illegal capture or collision may be properly justified upon this ground. Upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages; as when they are but another name for the use of a mill (for example), as in White v. Moseley, 8 Pick. 356; or for the use of any other property where the value or profit of the use can be made to appear with reasonable certainty by the light of past experience, as might often be done where such profits had been for a considerable time uniform at the same season of the year, and there are no circumstances tending to show a probable diminution, had the injury not occurred. And possibly the same view, subject to the like qualifications, might have been taken of the profits of the plaintiff's business had it been confined to the mechanical trade of repairing watches and making gold pens, particularly if done purely as a cash business. But this business seems to have been carried on with that of the sale of jewelry. He kept a jewelry store, and the profits of so much of his business as may be regarded as mercantile business are dependent upon many more contingencies, and therefore more uncertain, especially if sales are made upon credit. Past profits, therefore, could not safely be taken as the exact measure of future profits; but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound discretion, should think them entitled to. Past profits in such cases, where the business has been continued for some length of time, would constitute a very material aid to the jury in arriving at a fair probable estimate of the future profits, had the business still continued without interruption.

Accordingly such past profits have been allowed for this purpose, both in actions ex contractu and ex delicto, though more frequently in the latter, where from the nature of the case no element of greater certainty appeared, and the actual damages must be more or less a matter of opinion; and where, as in the present case, though somewhat inconclusive, it was the best evidence the nature of the case admitted. See Wilkes v. Hungerford, 2 Bing. N. C. 281; Ingram v. Lawson, 6 Bing. N. C. 212; Lacour v. Mayor, 4 Duer, 406; and the following in actions upon contract: Driggs v. Dwight, 17 Wend. 71; Bagley v. Smith, 10 N. Y. 489.

But it is urged by the counsel for the defendant that damages for the loss of profits ought not to be allowed, because they could not have been within the contemplation of the defendant. Whether, as matter of fact, this is likely to have been true, we do not deem it important to inquire. It is wholly immaterial whether the defendant, in committing the trespass, actually contemplated this or any other species of damage to the plaintiff. This is a consideration which is confined entirely to cases of contracts, where the question is, what was the extent of obligation, in this respect, which both parties understood to be created by the contract? But where a party commits a trespass he must be held to contemplate all the damages which may legitimately follow from his illegal act. And where a party, though acting in good faith, yet knowing his right to be disputed by a party in possession, instead of resorting to a judicial trial of his right, assumes to take the law into his own hands, and by violence to seize the property or right in dispute, he must be held thereby to assume, on the one hand, the risk of being able to show, when the other party brings him into court, that the property or right was his, or that his act was legal; or, on the other, of paying all the damages the injured party may have suffered from the injury; and, if those damages are in their nature uncertain, then such as, from all the circumstances, or the best light the nature of the case affords, a jury, in the exercise of good sense and sound discretion, may find to be a full compensation.

We are therefore entirely satisfied that all the questions put to the witness Allison touched the nature, extent, and profits of the business before and after the trespass were competent, and improperly overruled; and that the charge of the court, so far as it excluded all consideration of the good will of the place, its peculiar value to the plaintiff, and his probable profits, was erroneous.

The judgment must be reversed, with costs to the plaintiff, and a new trial granted.

The other justices concurred.

HILL v. WINSOR.

(118 Mass. 251.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 4, 1875.

At the trial of an action of tort for personal injuries sustained in consequence of the defendants' steam-tug striking the fender of a bridge on which the plaintiff was at work, the plaintiff's evidence tended to show that the fender, which was built to protect the bridge, consisted of piles driven perpendicularly into the bed of a stream about twelve feet apart, with other piles driven at an angle to each of these, one of which was fastened to the top of each perpendicular pile, with a cap on top extending along the whole row of piles; that the plaintiff was at work standing on a plank nailed to the piles, and, in order to fit an inclined pile to the perpendicular one and the cap, he had put in a brace about a foot long to keep the inclined pile and the upright one apart while he was at work; that, while so at work, he saw the tug coming towards the fender, and tried to get on the cap, when the tug struck the fender some distance from him, and the jar caused the brace between the piles to fall out, the piles came together, he was caught between them, and severely injured. The defendants' evidence tended to show that the plaintiff was not seen by those on the tug until after the accident, though other men at work on the fender were seen; that the tug was drifted against the fender by the tide, and then started up; that it was the only way it could get away from the fender; and that it was usual for vessels, when so caught by the tide, so to do.

E. H. Derby and W. C. Williamson, for plaintiff. O. W. Holmes, Jr., and W. A. Munroe, for defendants.

COLT, J. In actions of this description, the questions whether the plaintiff was himself in the exercise of due care, and the defendants' act negligent, whether the injury suffered was due to that act, as well as the amount of damage to the plaintiff, are, as a general rule, practical questions of fact to be settled by the knowledge and experience of the jury. The defendants' liability depends upon circumstances which, as the cases arise, are of infinite variety and combination. If there is any evidence upon which the jury may legally found a verdict for the plaintiff, that verdict cannot be disturbed on exceptions as matter of law, unless there has been some error in the conduct of the trial, or the judge has failed to state the true test of liability in his instructions as applied to the facts disclosed.

Under the instructions given in the present case, the jury must have found that the injury of the plaintiff was caused by the neglect or want of ordinary care on the part of those who, as agents and servants of the defendants, had charge of the tug-boat; and that this negligence consisted in not using such care in its navigation and management as persons of ordinary prudence would use under circumstances of like exposure and danger. They must have also found that the plaintiff was himself in the exercise of due care in attempting to escape the peril to which he was exposed by the defendants' conduct, and that his injury was therefore due solely to the defendants' negligence. The evidence reported justifies these findings. The structure upon which the plaintiff was at work was imperfect and out of repair. Its condition at the time, the plaintiff's exposed position upon it, and the knowledge of that exposure which those in charge of the boat had, or in the exercise of due care might have had, were elements affecting the question of the defendants' negligence to which the attention of the jury was especially called. It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. Lane v. Atlantic Works, 111 Mass. 136, and cases cited.

A majority of the court are of opinion that there was no error in refusing to give the specific instructions requested; and that, so far as they contain correct propositions of law applicable to the facts presented, they appear to have been given. The court was not bound to adopt the precise language of the request. As to the second and sixth, it is enough to say that there is no rule of law which exempts one from the consequences of his negligent conduct upon proof that he proceeded in the usual manner and took the usual course pursued by parties similarly situated, although he was without notice that he could not safely do so. The defendants cannot protect themselves by proving the careless practices of others, and the circumstances here were such as to justify the inference that the defendants were bound to take notice of the danger.

The third and fourth requests improperly made the plaintiff's right to recover wholly dependent on the fact that notice to the defendants had been given by the parties in charge of the work, that the fender was not in proper condition for use, although there was evidence that the men on the tug saw the workmen on the bridge and the danger to which they were exposed in time to have prevented the injury.

The seventh and eighth are in effect requests for instructions that the defendants were not liable if they used ordinary care, and this rule was given to the jury, as we have seen.

Exceptions overruled.

SCHUMAKER v. ST. PAUL & D. R. CO.

(48 N. W. 559, 46 Minn. 39.)

Supreme Court of Minnesota. April 8, 1891.

Appeal from district court, Ramsey county; KELLY, Judge.

Wm. H. Bliss, for appellant. *Erwin & Wellington*, for respondent.

COLLINS, J. To plaintiff's complaint herein the defendant corporation interposed a demurrer, upon the ground that it failed to state facts sufficient to constitute a cause of action. Upon the argument of this appeal defendant contended that its negligence in the premises was insufficiently pleaded; that the injury complained of, provided the same could be said to have been the result of defendant's act, was not proximate, but was too remote a consequence to be chargeable to it; and, further, that from the allegations of the complaint it was manifest that plaintiff himself was guilty of contributory negligence. Very little need be said on any of these points, for none are well taken. The complaint contains much that is superfluous, but in respect to negligence it avers the defendant's duty to have been to furnish transportation to plaintiff, a car-repairer in its employ, from the wrecked caboose, which he had been sent out to repair by the foreman, back to St. Paul, when he had completed his work, and that it wrongfully, unlawfully, and negligently failed and omitted so to do, or to furnish plaintiff with transportation to any other place where shelter or food could be obtained, and that by reason of such negligent failure and omission plaintiff was compelled to and did walk to the village of White Bear, a distance of nine miles, in the night-time, in extremely cold and dangerous weather, that being the nearest point at which the necessary shelter and food could be had; that placing reliance upon defendant's performance of its duty towards plaintiff when he had completed his work, by furnishing transportation back to St. Paul from the place on its line of road where he had been taken to repair the caboose, plaintiff was wholly unprepared with means for properly sheltering or clothing himself. It was also averred that the facts and circumstances with reference to the location of the caboose, the inclemency of the weather, the distance to shelter or food, and that plaintiff, by reason of his reliance upon being transported back to St. Paul when through with his work, had not provided himself with proper clothing for such weather, were then well known to the defendant. The negligence of the defendant might have been specified with greater certainty, but from an inspection of the pleading it appears that defendant is charged with having unnecessarily and unreasonably placed its servant, the plaintiff, in serious danger, from which injury resulted, by carelessly and negligently omitting to perform a duty immediately connected with his work, on the performance of which he had a right to and did rely. With full knowledge of the situation as to weather and the locality, consequently of the danger to be apprehended, it neglected and abandoned the plaintiff under circumstances which he alleges resulted in personal injury to him. It had no more right to unnecessarily and unreasonably leave him in a dangerous place, to expose him to an unnecessary and unreasonable risk from the elements, by failing to furnish transportation from the place where he had been put at work, when that work was completed, it being its duty so to do, according to the complaint, than it had to unnecessarily and unreasonably expose him to risks and dangers while he was at work,—such risks and dangers as were discoverable by the use of ordinary precaution and diligence. The defendant should have been reasonably diligent, and could not, without incurring liability, desert the plaintiff in the manner and under the circumstances set forth in the complaint.

The important question in this case, however, is whether, from the complaint, it appears that defendant is liable for the injuries which resulted from plaintiff's efforts to obtain shelter and food on the occasion referred to; the former, as before stated, arguing that, as alleged, they are too remote, and are not the proximate results of its act. It is averred that, by reason of the unavoidable exposure of the plaintiff, he was made sick, contracted rheumatism, has ever since suffered great pain and agony, and has been permanently injured. It must not be forgotten that the *gravamen* of the action is the negligence and carelessness of the defendant in leaving plaintiff at a place where he could not procure either shelter or food. It is an action in tort, and not for a breach of contract. It is the negligence of the defendant which is complained of, and not the breach of a contract to return the plaintiff to St. Paul when he had performed his labor. It was, of course, essential that the plaintiff's relation with the defendant be made to appear, for, unless he was a servant to whom the defendant owed a duty, there could arise no liability by reason of its neglect to perform that duty. The relation of master and servant first having been shown to exist, the law fixes the duty of the former towards the latter, and a violation of this duty is a wrong, not a breach of the contract. This, then, is an action in which the wrong-doer is liable for the natural and probable consequences of its negligent act or omission; the general rules which limit the damages in actions of of tort being, in many respects, different from those in actions on contracts. The injury must be the direct result of the misconduct attributed, and the general rule in respect to damages is that whoever commits a trespass or other wrongful act is liable for all the direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Dam. 130, note, and cases cited; Clifford v. Railroad Co., 9 Colo. 333, 12 Pac. Rep. 219, a case much like this. He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for the wrong.

The damages cannot be considered too remote if, according to the usual experience of mankind, injurious results ought to have been apprehended. It is not necessary that the injury in the precise form in which it, in fact, resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. Hill v. Winsor, 118 Mass. 251. The question is whether the negligent act complained of—leaving the plaintiff in the open country in the nighttime, in extremely cold and dangerous weather, a long distance from shelter or food—was the direct cause of the injuries mentioned in the complaint, or whether it was a remote cause, for which an action will not lie, and it must be taken for granted that the walk of nine miles and incident exposure brought about the alleged sickness, pain, and disability. There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands, or his feet, or perhaps his life, by freezing, no doubt could exist of the defendant's liability. It must not be permitted to escape the consequences of its wrong because the injuries were received in an effort to avoid the threatened danger, or because they differ in form or seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened between it and the result. This is the substance of very clear statements of the law found in Kellogg v. Railway Co., 26 Wis. 223, and in Railway Co. v. Kellogg, 94 U. S. 469. And upon the point now under consideration we fail to distinguish between the case at bar and Brown v. Railway Co., 54 Wis. 342, 11 N. W. Rep. 356, 911,—an action brought to recover for like damages said to have been caused by directing passengers to alight from a train at a place about three miles distant from their destination. At all events, the question as to what was the proximate cause of a plaintiff's injuries is usually one to be determined by a jury. As was said in Railway Co. v. Kellogg, supra, the true rule is that what is the proximate cause of an injury is ordinarily one for a jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it.

Finally, the defendant insists that plaintiff was guilty of contributory negligence, because, from the complaint, it appears that he was wholly unprepared with clothing sufficient for the occasion, and because he left the shelter of the caboose when he undertook his journey upon foot to the village of White Bear. The plaintiff, undoubtedly, went prepared with such clothing as he would ordinarily and naturally need for the occasion, had the defendant performed its alleged duty, and this was all that was required of him. He was not obliged to anticipate the defendant's negligence or omission, and prepare for it, nor does it follow that, because there was a caboose at the place where he worked, it afforded him adequate and proper shelter for the night. If this was the fact, it can quite properly be shown as a defense upon the trial of the case. But the complaint negatives such a conclusion. Order affirmed.

MITCHELL, J., did not participate in the making and filing of this decision.

VOSBURG v. PUTNEY.

(50 N. W. 403, 80 Wis. 523.)

Supreme Court of Wisconsin. Nov. 17, 1891.

Appeal from circuit court, Waukesha county; A. SCOTT SLOAN, Judge. Reversed.

Action by Andrew Vosburg against George Putney for personal injuries. From a judgment for plaintiff, defendant appeals.

The other facts fully appear in the following statement by LYON, J.:

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84, 47 N. W. Rep. 99. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition. On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

T. W. Haight (J. V. Quarles, of counsel), for appellant, to sustain the proposition that where there is no evil intent there can be no recovery, cited: 2 Greenl. Ev. §§ 82-85; 2 Add. Torts, § 790; Cooley, Torts, p. 162; Coward v. Baddeley, 4 Hurl. & N. 478; Christopherson v. Bare, 11 Q. B. 473; Hollman v. Eppers, 41 Wis. 251; Krell v. Lull, 49 Wis. 405, 5 N. W. Rep. 874; Crandall v. Transportation Co., 16 Fed. Rep. 75, Brown v. Kendall, 6 Cush. 292.

Ryan & Merton, for respondent.

LYON, J. (after stating the facts). Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

II. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff, (who was plaintiff's attending physician,) elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of plaintiff's witnesses, first saw it

March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of Andrew Vosburg in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone." It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to-wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct. Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

III. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in Brown v. Railway Co., 54 Wis. 342, 11 N. W. Rep. 356, 911, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages —the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal. The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

TUNNICLIFFE v. BAY CITIES CONSOL. RY. CO.

(61 N. W. 11, 102 Mich. 624.)

Supreme Court of Michigan. Dec. 7. 1894.

Error to circuit court, Bay county; Andrew C. Maxwell, Judge.

Action by Louise M. Tunnicliffe, by her next friend, William H. Tunnicliffe, against the Bay Cities Consolidated Railway Company, for personal injuries. Judgment was rendered for plaintiff, and defendant brings error. Reversed.

T. A. E. & J. C. Weadock, for appellant. James Van Kleeck, for appellee.

MONTGOMERY, J. Plaintiff is a married woman and a minor. She sues by her next friend to recover for personal injuries received while attempting to alight from a car of the defendant. Plaintiff recovered, and defendant brings error. The negligence alleged was that "while plaintiff, with the consent and permission of said defendant, with due care and diligence on her part, was passing out of said car, and onto and over the rear platform of the same, for the purpose of alighting therefrom and leaving said car, and was stepping from the platform of said car to the steps thereof, said car being then and there stationary, said defendant carelessly and negligently caused said car, from which she was then departing and stepping off, to be suddenly started, jerked, and moved forward, by means whereof this plaintiff, while in the exercise of proper care and diligence on her part, was thrown down and against said car, and down and upon the platform thereof, and down and upon and against the steps of said car, and her dress skirt or skirts caught on said bolt, so negligently put, placed, and permitted to be and remain in said platform by said defendant as aforesaid, and she was held fast to and against said car, and against the platform of said car, and to and against the steps thereof, and partially upon the ground, and was so held, dragged, and carried along by the motion of said car," etc. The declaration had previously alleged that defendant had "carelessly and negligently placed, and permitted to be and remain, an iron bolt, extending and projecting above the rear platform, to wit, five inches."

1. In the course of the charge to the jury, the circuit judge asked for suggestions from counsel. Defendant's counsel thereupon asked the court to charge that the plaintiff could not recover under any circumstances by reason of the location of the bolt or pedal, and called attention to a portion of the charge of the court as follows: "I do not understand that it is seriously contended by the defendant if the accident happened because of this bolt remaining in an improper place during the journey, to endanger women getting off the car, but what the company is liable,"—and asked that it be modified. The plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, and that she was thrown backward, and her clothing caught. She further testified: "I took it for granted that my clothes were caught; I didn't know in what. I could not see, but in my struggle I threw my arm behind me, and, as I did so, my hand came down on something that projected from the platform, and I pulled my skirt, and a bolt came out from the platform." On cross-examination she testified: "I should think the bolt had no part in throwing me down, aside from the jerking of the car." It is claimed by the defendant that there was no room under this testimony for the jury to find that her clothing was caught before she was thrown backward. But we think this construction of the testimony is too narrow. It would appear from the charge of the court that defendant had contended before the jury that plaintiff's story was unreasonable and that the injury could not have occurred in the manner supposed by plaintiff. The jury had a right to construe the facts, and if, in their judgment, it was more reasonable to suppose that her clothing had been caught upon the bolt without her knowledge before the car started, and threw her to the ground, we cannot say that the circumstances of the case did not furnish a justification for that inference.

2. On the trial the plaintiff was permitted, against the defendant's objection, to testify that before the injury she had painted for profit, and was able to earn five to ten and fifteen dollars per week, and that by the injury she was rendered unable to do this kind of work. The court charged the jury upon the subject of damages as follows: "She is entitled to recover, in case you so determine from the evidence,—she is entitled, first, to the value of her time. Whatever it was worth a month or week, you will give it her, if you come to that conclusion, as I said before." It was error to admit this testimony, and permit the recovery for the impairment of the plaintiff's ability to earn money. The husband is, prima facie, entitled to the earnings of the wife. Hicks v. McLachlan, 94 Mich. 282, 53 N. W. 1107. But it is contended in the present case that, as the husband was a party to the proceedings as next friend to the plaintiff, he would be estopped by the verdict from bringing suit hereafter to recover these damages, and hence that no injury could have been done defendant; and Baker v. Railroad Co., 91 Mich. 298, 51 N. W. 897, is cited as sustaining this contention. The case cited fully recognizes that the objection as made in a suit prosecuted by the next friend is good; but it was held in that case that inasmuch as such testimony was admitted, and as plaintiff actually received payment upon the judgment in his capacity as next friend, he ought not to be permitted to recover it again in his individual capacity. In the present case,

the defendant, upon making the objection, had no reason to apprehend that the plaintiff expected to claim a recovery for any damages not within the issue, and particularly was this true under the circumstances of this case, as it appears conclusively that the defendant could not have understood that it was necessary to offer any proof to meet the plaintiff's testimony; for, after the plaintiff's testimony, above quoted, had been given, a question was put to another witness on the same line, which was objected to, and the court said: "I think the husband is entitled to the wages. I guess there is no use going into that in this case at all." After this, certainly, the defendant's counsel could not be expected to meet such proofs as had crept in on this subject; and the subsequent charge, above quoted, was not only erroneous as matter of law, but, given, as it was, after the previous intimation which cut off proofs, on the part of the defendant, was based upon a necessarily ex parte showing.

3. The testimony tended to show that one of the results of the injury to plaintiff was a miscarriage. The court charged the jury as follows: "As to this child, if the plaintiff lost a child by reason of the liability of the defendant in this case, you may give damage for it. The society, enjoyment, and prospective services of the child is a recognized element in that regard, and you may give what it is reasonably worth." This charge was clearly erroneous. There was, of course, no proof in the case as to the prospective earnings of the child, even if the mother would be the proper person to recover for such loss. Nor would the loss of the child's society be a proper element of damages. While the jury is allowed to consider the case with all its facts, and to take into account, for the purpose of compensation, not only the physical pain, but also mental suffering, in determining the award of damages, and while, of necessity, this involves to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb, yet beyond this it would not be competent for the jury to go, and to attempt to compensate for the sorrow and grieving of the mother. As was said in Bovee v. Town of Danville, 53 Vt. 183: "If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject for compensation. But the rule goes no further. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented." The only case which we have found which is in seeming conflict with this is that of Smith v. Overby, 30 Ga. 241; but the supreme court of that state, in the later case of Railroad Co. v. Randall, 85 Ga. 297, 11 S. E. 706, in treating of a charge which permitted of a recovery for the pain, suffering, or sorrow resulting from miscarriage, said: "We would suggest that the word 'sorrow' be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury, and is suffered at the time of the miscarriage. The loss of the child by a miscarriage would affect women so differently that it would be hard for men, sitting as jurors, to estimate it as an element of damage; and we therefore think that it would be better to omit in the future any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage,"—citing the case of Bovee v. Town of Danville, above cited. See, also, 5 Am. & Eng. Enc. Law, 42.

Numerous other questions are discussed in the briefs of counsel, but we think it unnecessary to consider them at length. Those relating to the expressions of pain and complaints of present suffering are within the previous rulings of this court. See Girard v. City of Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Lacas v. Railway Co., 92 Mich. 412, 52 N. W. 745, and cases cited. None of the other questions are likely to arise on a new trial. For the errors pointed out, the judgment will be reversed, with costs, and a new trial ordered.

GRANT, J., did not sit. The other justices concurred.

McNAMARA v. VILLAGE OF CLINTONVILLE.

(22 N. W. 472, 62 Wis. 207.)

Supreme Court of Wisconsin. Feb. 3, 1885.

Appeal from circuit court, Waupaca county. About 6 o'clock on the evening of December 22, 1881, the plaintiff started from a drugstore in the village to go to his boarding-place. In doing so, it became necessary to cross New London street in front of the drugstore, and go southward to, and then upon the sidewalk on, the east side of that street. That sidewalk crossed a ravine over a trestlework, and upon each side of it, and immediately over the trestle-work there was a railing. The north end of the sidewalk commenced about four rods north of the north end of the trestle-work; and near the north end the surface of the walk was about six inches above the surface of the ground; and as it approached the trestle-work where the railing began, the surface of the walk became more elevated from the ground until at a point near the north end of the trestle-work, where it was about 30 inches above the surface of the ground; and that is the point where the testimony tends to show that the plaintiff stepped or fell off the walk and was severely injured. The night was very dark, and the plaintiff had no light. It had rained. The walk was about five feet and four inches wide, and turned to the westward about seven inches in nineteen feet. There was no railing or barrier on either side of this elevated walk north of the north end of the trestle-work. The plaintiff's testimony tends to prove that at the time of the injury he was walking carefully, with his hands out before him feeling for the railings as he approached them. The plaintiff was familiar with the locus in quo. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, which was denied. The jury found for the plaintiff, and assessed his damages at $1,350. The defendant moved for a new trial upon the minutes of the judge, and the same was overruled. From the judgment entered thereon this appeal is brought.

Finch & Barber and F. M. Gurnsey, for appellant. E. P. Smith and John F. Burke, for respondent.

CASSODAY, J. Upon principles too well established by this court to require reiteration, the question whether the sidewalk was defective at the place of the injury was for the jury, and not for the court. Kaples v. Orth (Wis.) 21 N. W. 633; Hill v. City of Fond du Lac, 56 Wis. 246, 14 N. W. 25; Wright v. Fort Howard, 60 Wis. 119, 18 N. W. 750; Kenworthy v. Town of Ironton, 41 Wis. 647; Kavanaugh v. City of Janesville, 24 Wis. 621; Cuthbert v. City of Appleton, 24 Wis. 383. The same is true with respect to the plaintiff's alleged contributory negligence. Id. Such negligence, when not disclosed by the plaintiff's testimony, is purely a matter of defense. Kelley v. Railway Co. (Wis.) 19 N. W. 522; Wright v. Fort Howard, 60 Wis. 125, 18 N. W. 750; Hoth v. Peters, 55 Wis. 405, 13 N. W. 219; Randall v. Telegraph Co., 54 Wis. 147, 11 N. W. 419. Here, the court went so far as to indicate that the burden of proving the absence of contributory negligence was on the plaintiff. There is no ground for the defendant's exception to the submission of these questions to the jury, nor to the manner in which they were submitted. Exception is taken because the court refused to charge, in effect, that during the time plaintiff had no diploma he could not recover "for any loss of service" which he had sustained as a practicing physician. Under the statute the plaintiff could not recover compensation for such services rendered during that period; nor could he, during that period, testify as such expert. Rev. St. § 1436. But neither of those questions is here involved. The statute did not undertake to make the business or service unlawful, nor to prohibit or punish the reception of voluntary payments for such services. Luck v. Ripon, 52 Wis. 201, 8 N. W. 815. The law in this respect has not been changed by the act to prevent quacks from deceiving the people by assuming a professional title. Chapter 256, Laws 1881; chapter 40, Laws 1882. Any loss sustained through inability to continue a lucrative professional practice may be considered in estimating such damages. Phillips v. Railway Co., 5 C. P. Div. 280; Ehrgott v. Mayor, etc., 96 N. Y. 264. These things being so, the plaintiff was not precluded from recovering such damages as he had actually sustained, even though he had no diploma for a portion of the time he was so disabled, and hence the instruction was properly rejected. Luck v. Ripon, 52 Wis. 201, 8 N. W. 815.

Exception is taken because the court charged the jury, in effect, that if they found for the plaintiff, then no deduction should be made from the damages sustained, by reason of his disability having been prolonged in consequence of a predisposition to inflammatory rheumatism, and because the court refused to charge, in effect, that the plaintiff could not recover if the injury was the result of the disease, and not the direct and proximate result of the defendant's negligence. There is no evidence that would warrant the jury in finding that the disease interfered in the least with the plaintiff's powers of locomotion, or in any way contributed to his stepping or falling from the sidewalk at the time and place in question. The jury have found, in effect, that there was no negligence on the part of the plaintiff contributing to the injury, and hence that it was the direct and proximate result of the defendant's negligence alone. The presence of the disease may have aggravated and prolonged the injury, and correspondingly increased the damages. The jury were expressly authorized to include in their verdict such increased or additional damages, and we must assume that they did. Was this error? Under the repeated decisions of this court, we must answer this question in the negative. Oliver v. La Valle, 36 Wis. 592; Stewart v. Ripon, 38 Wis. 584; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911. In one of these cases the plaintiff was allowed to recover increased damages by reason of an organic tendency to scrofula in his system, and in each of the others by reason of a miscarriage in consequence of the injury. In the Brown Case the distinction was made between actions for tort, where the wrong-doer is held liable for all injuries naturally resulting directly from the wrongful act, though unforeseen, and actions for the breach of contract, where the damages are limited to such as arise naturally from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract, "as in Flick v. Wetherbee, 20 Wis. 392; Richardson v. Chynoweth, 26 Wis. 656; Candee v. Telegraph Co., 34 Wis. 471; Walch v. Railway Co., 42 Wis. 23; Hill v. Chapman, 59 Wis. 218, 18 N. W. 160; Hadley v. Baxendale, 9 Exch. 341; Hobbs v. Railroad Co., L. R. 10 Q. B. 111; Hone v. Railway Co., L. R. 8 C. P. 131; Jones v. George, 48 Am. Dec. 280; Bagley v. Railroad Co., 30 Am. Law J. 490.

The rule applicable to contracts thus quoted is taken from the opinion of the court in the recent case of Hamilton v. MaGill, L. R. 12 Ir. 202, and is there said to be a more accurate statement than is found in Hadley v. Baxendale. To the same effect are the notes to that case in Shir. Lead. Cas. 227–230, and Harvey v. Railroad Co., 124 Mass. 425. See, also, the late case of McMahon v. Field, 7 Q. B. Div. 595, where the plaintiff recovered on contract for the injury to his horses, who caught cold from unnecessary exposure to the weather. In that case Hobbs v. Railway is severely criticised and narrowly limited, if not entirely overruled. The distinction taken in the Brown Case has been recognized in several of the more recent cases, and in some of them that decision is expressly sanctioned. Railroad Co. v. Kemp, 30 Am. Law J. 92, 61 Md. 74, 619; Railroad Co. v. Eaton, 94 Ind. 474; Ehrgott v. Mayor, etc., 96 N. Y. 281; Tice v. Munn, 94 N. Y. 621; Murdock v. Railroad Co., 133 Mass. 15; Beauchamp v. Mining Co., 50 Mich. 163, 15 N. W. 65; McMahon v. Field, 7 Q. B. Div. 591; and see Mr. Irving Brown's notes, 47 Am. Rep. 381, 387; 41 Am. Rep. 53, 58. See, also, as bearing upon the question, Railroad Co. v. Staley, 1 Am. Law J. (Ohio) 136, 30 Am. Law J. 110; Lewis v. Railway Co. (Mich.) 19 N. W. 744. In actions on contracts of carriage it has often been held that a corporation or party could not by contract wholly exempt itself from all liability for injury inflicted by its own negligence. Richardson v. Railway Co. (Wis.) 21 N. W. 56; Canfield v. Railroad Co., 45 Am. Rep. 268; Sager v. Railroad Co., 50 Am. Dec. 659. In such cases the damages recoverable cannot be within the contemplation of the contract; for they are recovered in spite of it. In McMahon v. Field one of the judges went so far as to say that "the parties never contemplated a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract." To the same effect is Ehrgott v. Mayor, etc., 96 N. Y. 280. In this New York case the court say: "When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. * * * A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. * * * The true rule, broadly stated, is that a wrongdoer is liable for the damages which he causes by his misconduct." 96 N. Y. 281.

"The general rule in tort," says Mr. Sutherland (3 Suth. Dam. 714), "is that the party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done." This is expressly sanctioned in the Maryland case cited where a cancer was the intervening cause. It is a contradiction to say that parties contemplate—have in mind—things of which they are supposed to be unmindful. In the case cited from Indiana the court say a wider range of inquiry is permissible in actions for tort than for the simple breach of a contract. See Shirley's notes, 329. In that case the court quotes approvingly the rule stated by Mr. Thompson, which is substantially the same rule quoted from Addison approvingly in the Maryland case, that "whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequence be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrong-doer." Here the action is not on contract, but for a tort consisting of a breach of statutory duty. The defect in the walk is supposed to have been known to the officers of the municipality. The predisposition to inflammatory rheumatism was an intervening cause, but it was set in motion by the tortious act complained of. It is not likely that the officers of the village actually contemplated that the injury in question would result from the defect in the walk. They must have known, however, that all classes of people, infirm as well as firm, diseased as well as healthy, were liable to travel upon the walk. Under ordinary circumstances the infirm and diseased would have no difficulty in passing over the walk without incurring injury. But the plaintiff, under the circumstances stated, as found by the jury, incurred the injury without any fault on his part. The mere fact that he was more susceptible to serious results from the injury by reason of the presence of disease, did not prevent him from recovering the damages he had actually sustained.

For the reasons given, the judgment of the circuit court is affirmed.

WESTERN RAILWAY OF ALABAMA v. MUTCH.

(11 South. 894; 97 Ala. 194.)

Supreme Court of Alabama. Dec. 1, 1892.

Appeal from circuit court, Lee county; J. M. Carmichael, Judge.

Action by George Mutch, administrator of James Thomas Mutch, against the Western Railway of Alabama, to recover for the alleged negligent killing of his intestate by defendant. Judgment for plaintiff. Defendant appeals. Reversed.

After the rendition of the judgment for plaintiff, defendant moved the court for a new trial on the following grounds: (1) Because the jury found contrary to the evidence; (2) because the evidence did not authorize a verdict against the defendant; (3) because Mr. Augustus Barnes, one of plaintiff's attorneys, in his argument to the jury, in speaking of defendant's employes who were witnesses in this case, said "that he would not say, as a north Alabama attorney had said, that they 'testified with halters around their necks;' but he would say that they testified with a conscious regard to their position." The court overruled the motion for a new trial, and the defendant duly excepted. On this appeal, prosecuted by the defendant, there are many assignments of error, in which were included the overruling of defendant's motions for a new trial, but under the opinion it is deemed unnecessary to notice them in detail.

Geo. P. Harrison and R. F. Ligon, Jr., for appellant. A. & R. B. Barnes, W. J. Samford, and J. M. Chilton, for appellee.

STONE, C. J. The plaintiff, George Mutch, was a resident of Opelika. His son, James Mutch, was 9½ years old, well grown and developed for his age, and, in intelligence and brightness, was above the average of boys of his age. He went at large without being attended by a nurse or protector, and was attending school. The Western Railway of Alabama runs through Opelika, and has a station and depot in that city or town. There was an ordinance of force in Opelika which made it unlawful to run a train of cars within the corporate limits at a higher rate of speed than four miles an hour, and imposing a penalty for its violation. A freight train of the railroad was coming into Opelika on an afternoon in March, 1889. It had box cars, and attached to the side of one of them was a ladder, placed there to enable brakemen to reach the top of the car. The little boy, James, having placed himself at the side of the track, attempted to seize the ladder as it passed him, that he might climb up on it, and thus enjoy a ride. He did succeed in catching a round of the ladder, but, in attempting to ascend, he missed his footing, fell under the train, and was so injured and crushed that he died of the wounds. Up to this point there is no conflict or uncertainty in the testimony. The present suit was brought against the railroad, and seeks to recover damages from it for this alleged negligent killing of plaintiff's intestate. The negligence charged (and there is no other pretended, or attempted to be shown) is that the train was being moved at a greater rate of speed than four miles an hour. Some of plaintiff's witnesses testified that it was moving at the rate of six or seven miles an hour. On the other hand, defendant's witnesses placed the speed, some as low as three, and none above four, miles an hour. This was not the first time intestate had attempted to spring on moving trains, and he had been more than once cautioned against such attempts. Assuming that the speed of the train was in excess of four miles an hour, was there a causal connection between such breach of duty on the part of the railroad company and the injury done to plaintiff's intestate?

Persons who perpetrate torts are, as a rule, responsible, and only responsible, for the proximate consequences of the wrongs they commit. In other words, unless the tort be the proximate cause of the injury complained of, there is no legal accountability. In that able and valuable work, 16 Am. & Eng. Enc. Law, 436, is this language: "A 'proximate cause' may be defined as that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, producing the result complained of, and without which that result would not have occurred; and it is laid down in many cases, and by leading text writers, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances." On page 431 of the same volume it is said: "To constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening efficient causes; so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." That philosophic law writer Dr. Wharton, (Law of Negligence, § 75,) expresses the principle as follows: "If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any human agency, then such sequence, whether foreseen as probable, or unforeseen, is imputable to the negligence." Quoting from Chief Baron Pollock with apparent approval, he (in section 78) says: "I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. I am inclined to consider the rule of law to be this: That a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In the same section he quotes approvingly the following language from Lord Campbell: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action." In Shearman & Redfield's Law of Negligence (section 26) the principle is thus stated: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." The authorities from which we have quoted are everywhere regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail. See 16 Am. & Eng. Enc. Law, 428, 429; Railway Co. v. Kellogg, 94 U. S. 469; Herring v. Skaggs, 62 Ala. 180; Daughtery v. Telegraph Co., 75 Ala. 168. Lynch v. Nurdin, 1 Q. B. (N. S.) 29, 41 E. C. L. 422, is the strongest of the cases relied on in support of the present action. The injury in that case occurred in a city. The headnote contains a summation of the facts as follows: "Defendant (a cart man) negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led the horse on, and plaintiff was thereby thrown down, and hurt." It was held that the action was maintainable for the recovery of damages, "and that it was properly left to the jury whether defendant's conduct was negligent, and the negligence caused the injury." In delivering his opinion, Lord Denman used the following language: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent: that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." Reading the case of Lynch v. Nurdin in the light shed upon it by Lord Denman's reasoning, no one can fail to note the marked difference between that case and the one we have in hand. The argument by which the learned lord chief justice supported the judgment he announced has no application to the present one. That case was manifestly decided on the well-recognized principle that if one leave dangerous machinery, or any other thing of similar nature, unattended, and in an exposed place, and another be injured thereby, an action on the case may be maintained for such injury, unless plaintiff was guilty of contributory negligence. Clark v. Chambers, 3 Q. B. Div. 327; Kunz v. City of Troy (N. Y. App.) 10 N. E. 442; Stout v. Railroad Co., 2 Dill. 294, Fed. Cas. No. 13,504; Beach, Contrib. Neg. §§ 140, 206. Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence. In the opinion of the court in the case of Lynch v. Nurdin the causal connection between the negligence and the injury was so direct and patent that the driver, exercising ordinary care and prudence, should have anticipated and guarded against it. The implication from Lord Denman's language is very strong that he regarded the cart man's conduct as grossly negligent. Contributory negligence is no defense to injuries which result from gross negligence. But the principle declared in Lynch v. Nurdin was, if not materially shaken, at least shown to be inapplicable to a case like the present one, in the two later English cases of Hughes v. Macfie, 2 Hurl. & C. 744, and Mangan v. Atterton, L. R. 1 Exch. 239. See, also, McAlpin v. Powell, 70 N. Y. 126; Wendell v. Railroad Co., 91 N. Y. 420; Railroad Co. v. Bell, 81 Ill. 76. The case of Messenger v. Dennie, 137 Mass. 197, is a strong authority against the right to maintain the present action. Another case relied on in support of the present action is Railroad Co. v. Gladmon, 15 Wall. 401. That case is wholly unlike the present one, and rests on a different principle. The negligence of defendant's agent was manifest, and the injury was the natural consequence of the negligence. Had the driver been looking ahead, as he should have been, he would have seen the child's danger, and could and would have stopped his car before his horses did the injury. The causal connection in that case was complete, because the injury resulted so naturally from the driver's inattention that the law regards it as the probable consequence of his negligence. None of the cases cited support the contention of appellee.

The ordinance of Opelika, restricting the speed of trains within the corporate limits to four miles an hour, had one purpose,—one policy. Opelika is a town probably of four or more thousand inhabitants. The railroad antedated the town, and caused its location there. It runs centrally through the business portions of the place. In such conditions, men pursuing business avocations, as well as idlers and curiosity seekers, will congregate about the depot and track of the railroad, and will be constantly crossing, if not standing on, the track. They do both. Knowing this habit of men, most towns located on railroads have ordinances requiring trains passing through them to move at a low rate of speed. Why? Not because they apprehend that reckless persons will attempt to board the train while in motion. The wildest conjecture would scarcely take in an adventure so fraught with peril. The policy was to enable persons who might be standing on the track, or whose business pursuits required them to cross it, to get off the track, and thus escape the danger of a collision. The ordinance had no other aim.

We hold as matter of law that there was no proof whatever in this case tending to show a causal connection between the negligence charged and the injury suffered. To illustrate our views: Let us suppose that the negligence charged against the railroad company had been, not the too rapid movement of the train, but some imperfection, decay, or derangement of the ascending ladder which caused plaintiff's intestate to fall and lose his life. Would any one contend the railroad company would be liable for such accident? And is there a difference in principle between the case supposed and the one we have in hand? Charge No. 21, the general charge in favor of the defendant, ought to have been given. The great English commentator said, "Law is the perfection of human reason." This, in a sense, is true. It is the expression of the combined wisdom of the legislative body. It is the creature, however, of human thought, and nothing human is perfect. Nor is it true that legislative policy is unchanging. Conditions change, and the law which should adapt itself to human wants must change with them. Still, while the law stands on the statute book, it should be obeyed and conformed to as a rule of action. If we cut loose from its restraints, we expose ourselves to the tempests of human passion and human prejudice, and, like a ship at sea without rudder or compass, will surely be dashed on some of the many shoals which are found all along the voyage of life.

Trial by jury is a bulwark of American, as it has long been of English, freedom. It wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and 12 men chosen from the common walks of nonprofessional life; chosen for their sound judgment and stern impartiality. The one declares the rules of law applicable to the issue or issues formed, in the light of the testimony adduced; the other weighs the testimony, determines what facts it proves, and, molded by the law as declared by the court, renders its verdict. In the jury box, and under the oath the jurors have solemnly sworn on the holy evangelists of Almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the Goddess of Justice as blindfolded, and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against their convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath, in the fullest sense of the word,—a true expression of the convictions fixed on the minds of the jury by the testimony. Independent of the legal question considered above, and which we have declared to be determinative of this case, the verdict of the jury was so palpably against the evidence that a new trial ought to have been granted on that account.

Reversed and remanded.

CHAMBERLAIN v. CITY OF OSHKOSH.

(54 N. W. 618, 84 Wis. 289.)

Supreme Court of Wisconsin. Feb. 21, 1893.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by Anna Chamberlain against the city of Oshkosh to recover for personal injuries caused by defendant's alleged negligence. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

H. I. Weed, for appellant.

Finch & Barber, for respondent.

For an ordinary, general, and transient slipperiness, due to the ordinary action of the elements only, and capable of being removed by such ordinary action of the elements, there is no liability, but for a local, unusual, and permanent slipperiness, caused by a defect in the street, and which the ordinary action of the elements would not remove, the city is liable. Cook v. City of Milwaukee, 24 Wis. 270, 27 Wis. 191; Perkins v. City of Fond du Lac, 34 Wis. 435; Hill v. City of Fond du Lac, 56 Wis. 242, 14 N. W. Rep. 25; Stilling v. Town of Thorp, 54 Wis. 528, 11 N. W. Rep. 906; Grossenbach v. City of Milwaukee, 65 Wis. 31, 26 N. W. Rep. 182; Paulson v. Town of Pelican, 79 Wis. 445, 48 N. W. Rep. 715; McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. Rep. 434; Cromarty v. City of Boston, 127 Mass. 329; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. Rep. 642; Todd v. City of Troy, 61 N. Y. 506; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. Rep. 43; Kinney v. City of Troy, 108 N. Y. 567, 15 N. E. Rep. 728; Kenney v. City of Cohoes, (N. Y. App.) 3 N. E. Rep. 189; Spellman v. Inhabitants of Chicopee, 131 Mass. 443; Keith v. City of Brockton, 136 Mass. 119; Cloughessey v. City of Waterbury, 51 Conn. 405; Congdon v. City of Norwich, 37 Conn. 414; Burr v. Town of Plymouth, 48 Conn. 460; Landolt v. City of Norwich, 37 Conn. 615; Dooley v. City of Meriden, 44 Conn. 117; Hubbard v. City of Concord, 35 N. H. 52; Darling v. Town of Westmoreland, 52 N. H. 401; Clark v. City of Chicago, 4 Biss. 486; Mosey v. City of Troy, 61 Barb. 580; Mayor, etc., v. Marriott, 9 Md. 160; City of Providence v. Clapp, 17 How. 161; Evans v. City of Utica, 69 N. Y. 166; Darling v. Mayor, etc., 18 Hun, 340; Evers v. Bridge Co., Id. 144; Blakeley v. City of Troy, Id. 167; Thomas v. Mayor, etc., 28 Hun, 110. In all these cases the test of liability is whether the city is responsible for the slipperiness, either in its formation by a structural defect in the sidewalk, or by allowing it to remain too long after it is formed. Smooth and level ice may be dangerous as well as rough ice, and the question simply is, was any negligence of the city the cause of its formation or retention? The following cases are a direct authority on this point: Cromarty v. City of Boston, 127 Mass. 329; Spellman v. Inhabitants of Chicopee, 131 Mass. 443; Cloughessey v. City of Waterbury, 51 Conn. 405; Paulson v. Town of Pelican, 79 Wis. 445, 48 N. W. Rep. 715. If the condition is artificial, instead of natural, and is caused by the negligence of the city, the city is liable. The case of Spellman v. Inhabitants of Chicopee, supra, is almost identical in the facts with the case at bar.

ORTON, J. This action is to recover damages for a personal injury to the plaintiff, occasioned by the want of repair and defective condition of a walk in Merritt street, in the city of Oshkosh. The defect is thus described in the complaint: "The said street, known as 'Merritt Street,' at a certain place in said street to wit, on the south side of said Merritt street, on the southeast corner thereof where said Merritt street intersects with Ford street of said city, was, (on the 21st day of February, 1889,) and for a period of four weeks or more had been, unsafe, insufficient, defective, and badly out of repair, in this, to wit, that at the point of junction between the stone crossing on the south side of said Merritt street, where said Merritt street intersects with Ford street, and the sidewalk on the south side of said Merritt street, where said stone crossing ends, the authorities of the city of Oshkosh, to wit, this defendant, negligently permitted a large hole to exist within the usual line and course of travel over said stone crossing and sidewalk, and negligently permitted and allowed said hole to exist and remain without placing any guard over or around the same, and negligently allowed said hole to become filled with water, and to become frozen over with a large surface of smooth ice, and negligently failed to place any protection, guard, or cover over or around said surface of ice, and failed to take any precaution to prevent or warn travelers over said crossing or sidewalk from walking upon and over said surface of ice. That persons traveling over and upon said crossing and sidewalk were compelled to walk upon and over said surface of ice, and that the aforesaid city authorities, to wit, the defendant, negligently failed to provide a safe and sufficient crossing or passage over or around said large surface of smooth ice." The plaintiff's injury, and the manner of it, are substantially described as follows: The plaintiff, while traveling upon said Merritt street and over the said stone crossing, "did by necessity and in the ordinary course of travel, walk upon and over said large surface of ice, and without any fault on her part she fell upon said surface of ice with great force," and received great bodily injuries therefrom. After the plaintiff was sworn as a witness in her own behalf, the defendant city interposed a demurrer ore tenus on the ground that the complaint did not state a cause of action, and the objection to any evidence under it was overruled, and exception taken. The plaintiff testified that when she came to that point "her feet came from under her, and she came down on her back. She did not notice any barriers or guards around this place, or any ashes upon the sidewalk where she slipped." According to the evidence, the depression in the street, where the water had accumulated which made the ice on which the plaintiff slipped down and was injured, was made by the junction of a sidewalk coming down Ford street with the stone cross walk over Merritt street. It would seem that the slight difference of the grade of the two streets made the depression. The slopé of the plank sidewalk down to its junction with the stone cross walk was only four inches, and the depression in the stone cross walk where the ice accumulated was from an inch to an inch and a half. The plank walk was over the gutter on Merritt street. This defect, if any, appears to have been in the plan of the work and its construction. At the conclusion of the testimony the defendant's motion for a nonsuit was overruled. The jury found a special verdict "that the cross walk was in a defective and dangerous condition," and "that such condition caused the plaintiff's injury," and assessed her damages at $1,100. It will be observed that the complaint does not charge that the plaintiff's injury was caused by a hole or depression in the cross walk, but that it was caused wholly by the smooth surface of the ice at that place, and such was the evidence. The plaintiff slipped and fell on the smooth surface of the ice. The ice was the proximate cause of the injury. The depression in the walk where the ice formed, if a defect, and a cause of the injury in any sense, was a remote, and not the proximate, cause of the injury. But at this time there was no hole, or even depression, at that place. It was filled up by the ice. It is too plain for argument that the cause of the plaintiff's injury, both by the complaint and testimony, was the smooth surface of the ice on the cross walk. The special verdict is careful not to state the defect or dangerous condition. It will be observed, also, that the negligence of the city consists "in failing to provide a safe crossing or passage over and around said large surface of smooth ice, and allowed and permitted said crossing to remain in such insufficient, unsafe, and defective condition for a period of four weeks, and failed to take any precaution to prevent or warn travelers over said crossing or sidewalk from walking upon and over said surface of ice." The existence and continuance of said ice for four weeks was the presumptive notice to the city of the defect complained of. The plaintiff does not complain of being injured by the hole or depression, but by the "large surface of smooth ice." The depression was the cause of the water accumulating there, and the water, combined with a low temperature, caused the ice to form which injured the plaintiff. The depression was a remote cause or cause of causes. The proximate or direct cause was the ice, and this must be the cause of action. "Causa proxima, non remota, spectatur,"—the proximate, and not the remote, cause, must be considered. The cause nearest in order of causation, which is adequate to produce the result, is the direct cause. In law, only the direct cause is considered. These are familiar maxims. "The proximate cause is the cause which leads to, and is instrumental in producing, the result." 3 Amer. & Eng. Enc. Law, 45; State v. Railroad Co., 52 N. H. 528. In this case the hole or depression is not the cause of the injury for which an action may be brought. It is too remote. There is a direct cause of the injury, and that is the ice on which she slipped down, and that is the only one which can be considered. The defect in the street or walk is the ice, and the negligence of the city consists in allowing it to remain. This was dangerous to the traveling public, and the cause of the plaintiff's injury in the law and by the complaint and testimony. This ice was smooth and level, and accumulated through the sole agency of the elements and in the order of nature. No argument, speculation, or casuistry can make this case any different from this. The main and important question which first presents itself on the demurrer to the complaint, and again on the motion for a nonsuit, is, is such a condition of the walk an actionable defect? This question is settled by this court in the negative in many cases, after a very full examination of the authorities elsewhere, which we need not cite. "When the walk is slippery because of the smooth surface of the snow and ice which had accumulated upon it," such a defect is not actionable. Cook v. City of Milwaukee, 24 Wis. 270, 27 Wis. 191. In Perkins v. City of Fond du Lac, 34 Wis. 435, "the walk was entirely covered with packed snow and ice, and the whole surface of the walk was very smooth and slippery." It was held that such a condition of the walk did not alone constitute an actionable defect; and so in Grossenbach v. City of Milwaukee, 65 Wis. 31, 26 N. W. Rep. 182. This holding is most reasonable. Such a defect in a walk or street is common and natural everywhere in the winter season, and such actions would be numberless, unreasonable, and oppressive. The municipalities are powerless to prevent or remove such a common and natural condition. The authorities cited by the learned counsel of the respondent are not applicable to this case. They are cases where other defects combine with the ice to cause the injury. Such defects must be present with the ice, and they together constitute a cause of action; as, where the ice is formed on a steep declivity or descending grade, or there is some other condition of the walk, which, together with the ice, makes the walk dangerous, as in Grossenbach v. City of Milwaukee and Perkins v. City of Fond du Lac, supra, and other cases in this court. But here the hole or depression does not combine with the ice, and is not present with it. There is no hole at the time, as it is filled with ice, and the surface is made level as ice can be anywhere. The plaintiff was not injured by stepping into the hole, but by slipping on the ice. But I have said enough of this. The hole was only the remote cause, or cause of causes, which produced the result, and was not the direct, efficient, or adequate cause, which alone is actionable. The court should have sustained the demurrer ore tenus, or, failing in that, ought to have ordered a nonsuit on the evidence. The judgment of the circuit court is reversed. and the cause is remanded for a new trial.

Mechem [illegible]

[illegible]

BLYTHE et al. v. DENVER & R. G. RY. CO.

(25 Pac. 702, 15 Colo. 333.)

Supreme Court of Colorado. Jan. 10, 1891.

Commissioners' decision. Error to district court, Arapahoe county.

Plaintiffs in error brought suit against the defendant as a common carrier for the loss of a package of merchandise consisting of gold and silver watches, watch-cases and movements, of the alleged value of $726.95, delivered to defendant at Alamosa by one J. B. Moomaw, to be carried as an express package, directed to and to be delivered to plaintiffs at Denver. The package was not valued, and was accepted and receipted for as an ordinary package at a nominal valuation of $50, upon which charges of 65 cents were paid in advance for its transportation. The defendant, after denying the material allegations of the complaint, admitted the receipt of the package, the payment of the money for its transportation, the execution and delivery of its receipt for the same, and specially alleged as defenses: *First*, that the car in which such package was being transported was blown from the track by a furious wind, and the car and contents destroyed by fire, and that the loss was by inevitable accident and "the act of God;" *second*, that the shipper fraudulently concealed the value of the package, and it was received as being only of the value of $50; that it was placed in the body of the car, where ordinary packages were usually carried; that defendant had a fire-proof safe in the car, and had the shipper given the true value, and paid transportation for such value, the goods would have been placed in the safe, and would not have been lost; that, by the terms of the receipt given, defendant was exempted from any liability exceeding $50. A replication was filed putting in issue the special matters pleaded in defense, and averring negligence in not securing the package in the safe, and in not making proper efforts to save the property at the time of the disaster. The case was tried to a jury, resulting in a verdict for the defendant, and judgment upon the verdict.

Lucius P. Marsh, for plaintiffs in error.
Wolcott & Vaile, for defendant in error.

REED, C., (*after stating the facts as above.*) It is conceded that the wrecking of a portion of the train, such portion consisting of one engine and four cars, one being the express-car in which the goods were being carried, was by "the act of God," and inevitable. It is also conceded in argument that having a coal fire burning in a stove, and a lighted lamp in the compartment, as testified to, was not negligence on the part of the carrier. Counsel for plaintiffs in error in reply say: "In the brief of defendant in error, counsel have assumed for us a claim which we have not made, and they then proceed to demolish such assumed claim. They assume for us that we claim there was negligence in carrying in the car a stove with fire in it. * * * There was negligence,—we may call it by that name,—but such negligence was in not making the requisite efforts to save the goods after the peril had been incurred. We make no claim that there was negligence in carrying a stove in the car." By these concessions, two important questions are eliminated, and the issues are narrowed, the only questions remaining being: *First*. Was "the act of God" the proximate and direct cause of the loss sustained, so as to exonerate the carrier from liability, or was it the remote cause, and the fire against which the carrier is supposed to be an insurer the proximate and direct cause? *Second*. After the wrecking and overturning of the train by "the act of God," was the carrier guilty of negligence in failing to protect and secure the goods in the burning car?

Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms "proximate" and "remote" causes and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But, in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines "proximate cause," "that which immediately precedes and produces the effect, as distinguishd from the remote, mediate, or predisposing cause." And. Dict. Law: "The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause." But with these definitions in view, when two causes unite to produce the loss, the question still remains, which was the proximate cause? In Insurance Co. v. Tweed, 7 Wall. 52, the late lamented Mr. Justice MILLER said: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. 199, in delivering the opinion of the court, Mr. Justice STRONG said: "And certainly, that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant." In Railroad Co. v. Kellogg, 94 U. S. 475, it is said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In Insurance Co. v. Boon, 95 U. S. 130, it is said: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

Leaving out of consideration, as we must, by concession of counsel, all question of negligence in regard to the burning fire in the stove, a lighted kerosene lamp, and regarding each of them as securely protected against damage as prudence would require, and applying the rules above laid down, it becomes apparent that the overturning and wrecking of the car by the violence of the wind was the proximate, direct, and efficient cause of the loss, and the fire following, if not instantaneously, immediately after, without negligence or any wrongful act of the carrier intervening to produce it, must be regarded as resulting and incidental. It is ably contended in argument, and many supposed authorities in support of the position are cited, that the negligence of the carrier in failing to use proper exertion to save the contents of the car, after it was overturned, rendered the defendant liable for the loss. If, by proper diligence and attention the goods could have been rescued, a failure to secure them would have fixed the liability of the carrier. There can be no doubt of the correctness of this conclusion. The questions, what was the proximate cause of the loss, and of negligence, were questions of fact to be determined by the jury from the evidence, under proper instructions from the court. There was not much conflict of testimony. In Railroad Co. v. Kellogg, supra, it is said: "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time." The jury found as a fact that the "act of God" was the proximate cause, and also found as a fact that there was no negligence. Viewed in the light of all the evidence, and of attendant circumstances, the finding of the jury was fully warranted. The force of the gale was such as to blow the cars from the track over the embankment. It was shown to be almost impossible for men to stand or walk, and they were compelled to prostrate themselves under the lee of the track or bank to escape its fury. The air was so full of dust and flying material that scarcely anything could be seen. The car contained inflammable material, and the fire succeeded the overturning almost instantaneously. The messenger escaped with great difficulty, and not without injury from the flames. The position of the car was such that all movable goods must have been hurled into the corner of the top of the car. From the force of the wind, and combustible material of the car, it is obvious that the destruction of the car and contents was inevitable in a very brief space of time, and that any attempt to rescue the goods would have been unavailing.

Considerable criticism is directed to the instructions of the court. Some of those criticised, and upon which errors are assigned, are in regard to negligence in the use of the stove and lamp. As counsel concedes in his final argument that there was no negligence in that respect, a review of them becomes unnecessary. Considerable attention is given to the eighth instruction, in which the learned judge charged: "Where one is pursuing a lawful avocation, in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident' or the 'act of God.'" The objection urged is more technical than substantial. While it is, possibly, not technically correct, and while there is a legal distinction between "inevitable accident" and the "act of God," we can see nothing in it to the prejudice of the plaintiff, or that could have misled the jury. The immediate resulting cause producing the loss was the fire, which might properly be termed an "inevitable accident" growing out of the former disaster; while the direct cause of the agency that worked the destruction was the "act of God," putting the resulting agent at work. We think the charge, taken as a whole, was a fair and impartial statement of the law, and should be sustained. We advise that the judgment be affirmed.

RICHMOND and BISSELL, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

ELLIOTT, J., having tried this cause below, did not participate in this decision.

HAVERLY v. STATE LINE & S. R. CO.

(19 Atl. 1013, 135 Pa. 50.)

Supreme Court of Pennsylvania. May 19, 1890.

Appeal from court of common pleas, Bradford county.

Action by Leroy Haverly against the State Line & Sullivan Railroad Company for damage caused by fire. The testimony showed that on May 11, 1880, about 4 or 5 o'clock P. M. a train of defendant's passed over its road, and near the tract of land where plaintiff was lumbering; that soon afterwards smoke was seen issuing from a stump in the line of the defendant's right of way; that one of plaintiff's agents was sent to put out this fire, who, returning, reported he had done so; that no further smoke was seen in or around the stump until about 10 o'clock A. M. of the following day, when the plaintiff himself sent a servant, who, finding the stump on fire, poured water thereon until he supposed it was entirely extinguished, and he remained there half or three-quarters of an hour, until he satisfied himself that no fire remained; that about noon of the same day, the wind coming up and blowing lively, a fire broke out on said tract in the vicinity of said stump, which could not, on account of the wind, be controlled by the plaintiff or his agents, and destroyed a quantity of logs in which the plaintiff had an interest. Plaintiff obtained judgment. Defendant appeals.

Edward Overton, *John F. Sanderson*, and *Rodney A. Mercur*, for appellant. *H. N. Williams*, *I. McPherson*, *E. J. Angle*, and *R. H. Williams*, for appellee.

MITCHELL, J. The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, has been firmly established by the three cases of Railroad Co. v. Kerr, 62 Pa. St. 353; Railroad Co. v. Hope, 80 Pa. St. 373; and Hoag v. Railroad Co., 85 Pa. St. 293. It is most elaborately expressed by Chief Justice AGNEW in Railroad Co. v. Hope, in the following language: "The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendants." And the rule is again put somewhat more tersely by the present chief justice in Hoag v. Railroad Co., as follows: "The injury must be the natural and probable consequence of the negligence,—such a consequence as * * * might and ought to have been foreseen by the wrong-doer as likely to flow from his act." The three leading cases above referred to, though frequently cited on opposite sides of the same argument, are not at all in conflict in principle. The different results which were reached in them depended not on any different view of the law, but of the facts, and on the application of the familiar doctrine that, where a plain inference is to be drawn from undisputed facts, the court will decide it as a matter of law. In Railroad Co. v. Kerr the negligence had been held by the court below to be the proximate cause of the plaintiff's loss. This court held that it was remote, and did not award a new *venire*, but said that it would do so if plaintiff should desire it upon grounds shown. The question was then new; and, from what was said about the *venire*, the court itself does not seem to have been entirely clear that it should be decided as matter of law. It may be doubted whether, on the same facts, the court would not now send it to a jury. Certainly no subsequent case has assumed to decide where the facts were so near the line. Hoag v. Railroad Co. was a much clearer case, and so were Railway Co. v. Taylor, 104 Pa. St. 306; West Mahonoy Tp. v. Watson, 116 Pa. St. 344, 9 Atl. Rep. 430; Railway Co. v. Trich, 117 Pa. St. 390, 11 Atl. Rep. 627; and the other cases where the court has pronounced the negligence to be remote as matter of law. But, whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all.

In the present case the learned judge left the question of proximate or remote cause to the jury, in substantial conformity with the doctrine of Railroad Co. v. Hope. Appellant, however, claims that the succession of events was so broken as to bring the case under Hoag v. Railroad Co., and require the judge to direct the jury in its favor. The break in the chain of events was merely a gap in the time. Had the fire extended from the stump to plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with Railroad Co. v. Hope. But the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the casual connection was broken. The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury have found that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection. In Railroad Co. v. Kerr, (page 366,) it is said by THOMPSON, C. J., that the rule "is not to be controlled by time or distance, but by the succession of events;" and in Hoag v. Railroad Co., TRUNKEY, P. J., in charging the jury, had quoted the foregoing, and added: "Whether the fire communicated to the plaintiff's property within a few minutes, or after the lapse of hours, from the negligent act, may be immaterial." It is said in this case that the agents of plaintiff on the ground did not anticipate a further spread of the fire after the interval of time, and therefore it cannot be assumed that the defendant should have anticipated it. But the agents of plaintiff did not expect it because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning; and this was the danger that appellant was bound to contemplate, to-wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently. The pauses in the progress of the fire, therefore, and the lapse of time, while matter for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection.

But it is argued that it was not until the next morning after the fire started in the stump, and during the time when it was apparently extinguished, that the wind rose, and became a new cause of the spread of the fire to plaintiff's lumber. This, however, was, like the point already considered, dependent on the circumstances. In Railroad Co. v. Hope, one of the facts was a strong wind which carried the fire, and so, also, it was in Railroad Co. v. Lacey, 89 Pa. St. 458, and in Railroad Co. v. McKeen, 90 Pa. St. 129; and in this last case, TRUNKEY, J., says the jury "could also determine whether dry weather and high winds in the spring-time are extraordinary, and whether, under these conditions, * * * the injury was within the probable foresight of him whose negligence ran through from the beginning to the end." No doubt a hurricane or a gale may be such as to be plainly out of the usual course of nature, and therefore to be pronounced by the court as the intervention of a new cause. Such a wind would be like the flood in Morrison v. Davis, 20 Pa. St. 171. But the ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated. The lapse of time before the wind rose, in this case, was therefore not clearly a new cause to be so pronounced by the court, but a circumstance to be considered, with the others, by the jury. On this branch of the case, generally, the injury was not more remote from the alleged cause than in Railroad Co. v. Hope, supra, Railroad Co. v. Lacey, 89 Pa. St. 458, and Railroad Co. v. McKeen, 90 Pa. St. 129, and not so much so as in Fairbanks v. Kerr, 70 Pa. St. 86, and Railroad Co. v. Keighron, 74 Pa. St. 316, in all of which the question was held to have been properly submitted to the jury.

There remains only the question of contributory negligence, and we do not find any evidence that would have justified taking this from the jury. If plaintiff had not known of the fire in the stump, he would have had no duty in regard to it; but, knowing of it, he was bound to take all reasonable and practicable measures to prevent its spreading to his lumber. He was not an insurer. The measure of his duty in this regard was reasonable care and diligence, and whether he used these was fairly and accurately submitted to the jury. That they found against the defendant's view was no fault of their instruction as to the law. Judgment affirmed.

LEWIS v. FLINT & P. M. RY. CO.

(19 N. W. 744, 54 Mich. 55.)

Supreme Court of Michigan. June 11, 1884.

Error to Wayne. Plaintiff brings error.

Blodget & Patchin and C. I. Walker, for appellant. W. L. Webber and O. F. Wisner, for appellee.

COOLEY, C. J. Action to recover damages for a personal injury. The facts as they appeared on the trial were as follows: The plaintiff resides in the township of Huron, a few miles east of Belden station, on the road of defendant. He was at Wayne station on the evening of January 12, 1883, awaiting the train which was to go south past Belden in the night. The train left Wayne at 3:05 in the morning of the 13th, and he procured his ticket and took passage for Belden, where the train was due at 3:30. The night was dark, cold, and wet. The train stopped when "Belden" was called, and plaintiff got off. Belden was only a flag station for this train, and there was no one in charge of the station-house, and no light there. When plaintiff got off the train he was told by the brakeman or conductor that they had run by the station about two car lengths, and he replied that if that was all, it was no matter, as he had to go that way. An east and west highway crosses the railroad about 24 rods south of the station-house, which the plaintiff would take in going to his home. If he was two car lengths beyond the station-house, he would still be north of the highway; and, supposing that to be the case, he followed the track along south, in preference to going back to the station-house, from which a passage east of the track would have led him to the highway. The plaintiff knew the place well, and knew that on the track he must cross an open cattle-guard to reach the highway. He had crossed this before, and sometimes found a plank laid over it. Passing on he soon came to trees which he knew were some distance south of the highway, and he then knew the information given him as to where he was when he alighted from the train was erroneous. He turned about to retrace his steps, and followed the track in the direction of the highway. This he did carefully, because it was very dark, and he knew there was an open cattle-guard on the south side of the highway, as well as on the north side. He was looking for this cattle-guard constantly and carefully. There were burning kilns near to the track on his right, and the smoke from these affected his eyes, but he saw a switch light, which he knew was near the crossing, but which at the time was too dim to aid him. He continued to approach the cattle-guard carefully, intending, if there was a timber or plank over it, to cross upon that; and if not, then to pass down into it and climb out. In the dim light he saw what he believed to be the cattle-guard, which seemed to be several paces off, but at the very next step one foot slipped, and as he attempted to save himself by springing upon the other, the other foot caught, and he was precipitated into the cattle-guard, and he received an injury of a very serious and permanent nature. He was for a time senseless, but then succeeded in drawing himself out by his elbows,—not being able to use his lower limbs,—and with great difficulty he reached a neighboring tavern, where he was cared for.

On the trial a claim was made on the part of the defense that the plaintiff was negligent in following the railroad track back to the cattle-guard, and in attempting to cross it, when he might have left the track to the right and passed along the field until he came to the highway; and evidence was given to show that he would have encountered no impediments. But, in such a night as this was, it is not clear that the field would have afforded a safer passage than the highway, and his failure to take it would at most only raise a question of negligence on his part which would necessarily go to the jury. Railroad Co. v. Van Steinburg, 17 Mich. 118; Billings v. Breinig, 45 Mich. 72, 7 N. W. 722; Railroad Co. v. Miller, 46 Mich. 537, 9 N. W. 841; Marcott v. Railroad Co., 47 Mich. 7, 10 N. W. 3. In this case the court took the case from the jury, and directed a verdict for the defendant. This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action. The wrong of the defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not a proximate consequence of this wrong, the instruction of the court was right; otherwise, not. The difficulty here is in determining what is and what is not a proximate consequence in contemplation of law.

For the plaintiff, the cases are cited in which it has been held that one whose negligence causes a fire by the spreading of which the property of another is destroyed, is liable for the damages, though the property for which the compensation was claimed was only reached by the fire after it had passed through intervening fields or buildings. Kellogg v. Railroad Co., 26 Wis. 223; Fent v. Railroad Co., 59 Ill. 349; Wiley v. Railroad Co., 44 N. J. Law, 248; Railroad Co. v. Kellogg, 94 U. S. 469. But these cases, we think, are not analogous to the one before us. The negligent fire was the direct and sole cause of the injury in each instance, and there was no intervening cause whatever. The cases are in harmony with Hoyt v. Jeffers, 30 Mich. 181. The case of Pennsylvania Co. v. Hoagland, 78 Ind. 203, seems, at first view, to be more in point. The action in that case was brought by a woman, who, in consequence of misinformation on the part of the person in charge of a railroad train, left the car in the nighttime at the wrong stopping place, and wandered about for an hour or more before she could find shelter, taking cold from exposure. But here, as in the other cases cited, there was no cause intervening the wrong complained of and the resulting injury, and the question of proximate cause does not appear to have been raised in the case. Smith v. Packet Co., 86 N. Y. 408, is also relied upon, but it is unlike this in the important particular that the intervening cause, which, after the first wrong on the part of the defendant, operated to bring injury to the plaintiff, was a neglect of proper care, which the court held was due from the defendant to the plaintiff under the circumstances, so that all the injury received was a proximate result of the defendant's neglect of duty.

The case of Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, more nearly resembles the present case than any other to which our attention has been called by counsel for the plaintiff. The facts, as stated in the prevailing opinion, are the following: The plaintiffs, with their child, 7 years old, were being carried on defendant's cars, with Mauston for their destination, and when they arrived at a station three miles east of Mauston, they left the train, under the direction of the brakeman, who told them they were at Mauston. It was in the night; it was cloudy and wet; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible, except on the freight train. Plaintiffs soon ascertained they were not at Mauston, but did not know where they were. They did not see the station-house, though there was one, hidden from their view by the freight train. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to a bridge, within a mile of Mauston, and then they thought it easier to go on to that place than to seek shelter at the house, which was a considerable distance from the track. Mrs. Brown was pregnant at the time, and when she arrived at Mauston was quite exhausted. She had, during the night, severe pains, which continued from time to time, and were followed by flowing, and at length by a miscarriage, inflammation, and serious illness. The plaintiffs claimed that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston, and the question in the case was whether the defendant was liable for the injury to Mrs. Brown, admitting it to have been caused by her walk. The majority of the court finding that "there was no intervening independent cause of the injury other than the act of the defendant," and that "all the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant," held that "the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate, and not the remote, cause of the injury," quoting Lord Ellenborough in Jones v. Boyce, 1 Starkie, 493, that "if I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

The case of Car Co. v. Barker, 4 Colo. 344, is opposed to the case in Wisconsin, as are also Hobbs v. Railroad Co., L. R. 10 Q. B. 111, and Francis v. Transfer Co., 5 Mo. App. 7. But it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before us there was an independent cause intervening the fault of the defendant and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence. To show what is understood by intervening cause, it may be useful to refer to a few cases:

Livie v. Janson, 12 East, 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was damaged by perils of the sea, stranded, and wrecked on Governor's island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is Delano v. Insurance Co., 10 Mass. 354, where a like result was reached.

In Tisdale v. Norton, 8 Metc. (Mass.) 388, the facts were that a highway was defective and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town; and the proximate cause in this case was outside the highway, not within it.

In Anthony v. Slaid, 11 Metc. (Mass.) 290, the plaintiff, who was contractor with a town to support for a specified time and for a fixed sum all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of the paupers, as a consequence of which the plaintiff was put to increased expense for care and support, but the action was held not maintainable.

In Silver v. Frazier, 3 Allen, 382, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, C. J.: "The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal, and was induced to do so by the false statement of the defendant. In other words, the plaintiff alleges that his agent violated his duty, and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent, by false statements, to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good cause of action to the plaintiff."

In Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and, while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood; but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: "An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city, which he attempts to cross, from defects therein, falls, and his horses are killed. By the breaking of the bridge and the loss of his team he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses; the secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second is denied." Similar to this are Daniels v. Ballantine, 23 Ohio St. 532; and McClary v. Railroad Co., 3 Neb. 44. In each of these cases the negligence of the defendant left the property of the plaintiff where, by an act of God,—in one case a flood, and in the other a tornado,—it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of injury.

In Scheffer v. Railroad Co., 105 U. S. 249, it appeared that, by a collision of railroad trains, a passenger was injured, and, becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. Miller, J., speaking for the court, and referring to Insurance Co. v. Tweed, 7 Wall. 44, and Railroad Co. v. Kellogg, 94 U. S. 469, said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause, and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad."

In Bosch v. Railroad Co., 44 Iowa, 402, the plaintiff's house took fire, and the fire department, because, as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."

In this last case, Metallic Compression Co. v. Railroad Co., 109 Mass. 277, was referred to and distinguished. The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to distinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was also in Billman v. Railroad Co., 76 Ind. 166; Lane v. Atlantic Works, 111 Mass. 136; and Ricker v. Freeman, 50 N. H. 420,—all of which are ruled by the Squib Case, (Scott v. Shepherd, 2 W. Bl. 892;) and so, perhaps, are Fairbanks v. Kerr, 70 Pa. St. 90; and Lake v. Milliken, 62 Me. 240.

In Henry v. Railroad Co., 76 Mo. 288, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and, while upon the ground, stepped upon a track, where he was run upon and injured by a train. Hough, J., speaking for the court, said: "It is perhaps probable that if the plaintiff had not been ordered out of the caboose he would not have been injured. But this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not therefore be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural, nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation, in the absence of any regulation of defendant to justify it, cannot be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or, being able to get in, chose to remain outside."

Further reference to authorities is needless. The application of the rule that the proximate, not the remote cause is to be regarded, is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right, from the information received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained the plaintiff discovered where he was, and started back for the road which he had intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature; for, on the supposition that he was north of the highway when he left the train, he had voluntarily started south with the expectation of crossing the cattle-guard on that side, over which he might or might not find a plank laid, when by stepping back a few rods, where he supposed the station-house to be, he might pass from thence out to the highway by the passage-way for persons and vehicles leading from the station-house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger. Neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain first whether a plank or timber was laid across, and if so to cross upon it; and if not, to step down into the excavation and out on the other side. Where was he to look for danger? The night was dark, it is true, but even by the sense of feeling, when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine its exact location. But then something happened which it is evident that the plaintiff, with full knowledge of all the facts, did not at all expect and had not feared. Misled apparently by visual deception, he moved forward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and his deception, with the slipping of his foot, concurred to produce the injury. What was this but pure accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip; and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God; in the other, inevitable accident; but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long sequence; but, as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. Weaver v. Ward, Hob. 134; Gibbons v. Pepper, 1 Ld. Raym. 38; Losee v. Buchanan, 51 N. Y. 476; Vincent v. Stinehour, 7 Vt. 62; Morris v. Platt, 32 Conn. 75; Brown v. Collins, 53 N. H. 442; Bizzell v. Booker, 16 Ark. 308; Marshall v. Welwood, 38 N. J. Law, 339; Paxton v. Beyer, 67 Ill. 132; Express Co. v. Smith, 33 Ohio St. 511; Plummer v. State, 4 Tex. App. 310; Parrot v. Wells, 15 Wall. 524; Holmes v. Mather, L. R. 10 Exch. 261. A case like this appeals strongly to the sympathies, but sympathy cannot rule the decision.

Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him, and the circuit court was correct in so holding. The question what judgment shall be rendered in the case is for the present reserved.

The other justices concurred.

WOOD v. PENNSYLVANIA R. CO.

(35 Atl. 699, 177 Pa. St. 306.)

Supreme Court of Pennsylvania. Oct. 5, 1896.

Appeal from court of common pleas, Philadelphia county.

Action by Joseph Wood against the Pennsylvania Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Frederick J. Knaus and Thomas Leaming, for appellant. John Hampton Barnes and Geo. Tucker Bispham, for appellee.

DEAN, J. We take the facts as stated by the court below, as follows: "On the 26th of October, 1893, the plaintiff, having bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankford to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platfrom two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour. Upon this state of facts, the trial judge entered a nonsuit." The court in banc having afterwards refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in Hoag v. Railroad Co., 85 Pa. St. 293, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to flow from his act?" As concerns the situation of plaintiff at the time of his injury, and the relation of that fact to the cause, whether near or remote, we do not consider it important. He was where he had a right to be,—on the platform of the station. That he had purchased a ticket for passage on defendant's road, and was waiting on its platform for his train, has no particular bearing on the question. The duty of defendant to him at that time was to provide a platform and station, safe structures, for him and others who desired to travel. In this particular its duty was performed. The injury is not in the remotest degree attributable to the platform or the station. It is sufficient to say, when there, he was not a trespasser on defendant's property, and therefore his action does not fail for that reason; but he is in no more favorable situation as a suitor than if he had been walking alongside the railroad, on the public highway, or at any other place where he had a right to be. The rule quoted in Hoag v. Railroad Co., supra, is, in substance, the conclusion of Lord Bacon, and the one given in Brown's Legal Maxims. It is not only the well-settled rule of this state, but is, generally, that of the United States. Prof. Jaggard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them Hoag v. Railroad Co., comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Jag. Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69. This, also, is in substance the rule of Hoag v. Railroad Co. All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in Hoag v. Railroad Co. Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen, of this act? We answer in this and all like cases: from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregardful of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in Hoag v. Railroad Co., be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in Railroad Co. v. Trich, 117 Pa. St. 399, 11 Atl. 627: "Responsibility does not extend to every consequence which may possibly result from negligence." What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it.

But there is another view which may be taken of this evidence. Assuming defendant was negligent, did that negligence contribute in any degree to the result? The uncontradicted evidence showed the train could be seen from 150 to 200 yards distant. Plaintiff himself testifies he heard it coming, although he heard no whistle or bell; and all his witnesses had notice of it. Even those sitting in the waiting room got up to go out, supposing it was their train. Some heard the rumbling; some saw the headlight. Assume, then, the fact to be that no warning was given by bell or whistle, and in that particular defendant, in its general duty to the public, was negligent, was this the cause of the injury? To so find, we must presume the deceased and her companion failed to hear or see what all the others saw or heard. There is no reason for such presumption. While, in the absence of any evidence on the question, the presumption would be that the two women, before crossing, stopped, looked, and listened, and then, because no warning was given, they, without apprehension of danger, attempted to cross, still, when all the other witnesses with like opportunity either saw the headlight or heard the rumbling of the approaching train, the reasonable presumption is they saw and heard it too. If this be so, they attempted to cross with the same knowledge of the same peril they would have had if the bell had been rung and whistle blown. Therefore the sole cause of the injury was not the negligence of defendant, but the negligence of deceased. In such case there could have been no recovery by the representatives of the deceased woman, for, whatever might have been the negligence of defendant, it was no more the cause of the accident than if it had neglected to give warning at some other crossing. The case could not have reached the jury unless they had been permitted to infer she had neither seen nor heard the same warnings that all plaintiff's witnesses saw and heard. If the companion of deceased, or other witnesses, had testified they neither saw nor heard the approaching train, the case would have been altogether different; but, as it stood, there was no proof that the alleged negligence of defendant contributed to the death of the woman. In this view the negligence was not even concurrent. True, there was negligence, but the same result followed as if defendant had exercised care. Therefore the injury was attributable to her sole negligence. While the proper warning on approaching a crossing is the sound of a whistle or the ringing of a bell, no accident can be properly said to be the consequence of the neglect to give such warning if the public be apprised of the danger by other sounds or signals. The injury then is caused solely by the neglect of the injured person to heed the danger.

On both grounds we think the nonsuit was properly entered. The judgment is affirmed.

See [illegible]

[illegible]

GILSON v. DELAWARE & H. CANAL CO.

(26 Atl. 70, 65 Vt. 213.)

Supreme Court of Vermont. General Term. Dec. 22, 1892.

Exceptions from Rutland county court; Thompson, Judge.

Action by E. P. Gilson, receiver, against the Delaware & Hudson Canal Company, to recover damages for the diversion of a water course, whereby plaintiff's quarry was flooded. Judgment was entered in favor of plaintiff, and defendant excepts. Judgment affirmed.

The plaintiff brought suit as the receiver of the Dorset Marble Company. His evidence tended to prove that the defendant had, by the construction of its railroad embankment, diverted an ancient water course from its accustomed channel into his quarry, and had also collected and discharged surface water into said quarry. The railroad of the defendant, at the point complained of, was constructed in 1884, along a steep hillside. At one point there had been for many years a water course which drained at certain seasons of the year a considerable territory, but which during a considerable portion of the year was entirely dry. From the point where this water course crossed the line of the defendant's railroad the land gradually descended towards the quarry of the plaintiff. In constructing its railroad the defendant made no provision for the passage of the water running in this water course underneath its track, and the complaint of the plaintiff was that the defendant had thereby diverted this water course, and discharged it, together with the surface water which was collected by this embankment, into his quarry. The land, at the point where the water course crossed the line of the defendant's railroad, belonged to the Vermont Marble Company, as did the land between that point and the plaintiff's quarry. Upon this land of the Vermont Marble Company, and in close proximity to the defendant's quarry, were two abandoned quarries, owned by said Vermont Marble Company, and these abandoned quarries were partially filled with water at all times. The effect of the defendant's embankment, as constructed, was to deflect whatever water ran in the water course and whatever surface water ran down the sidehill, and to conduct it along the side and into the first of these abandoned quarries. When this quarry became filled with water the water would overflow into the second abandoned quarry, which lay adjacent to the quarry of the plaintiff. This quarry was separated from the plaintiff's quarry by what appeared to be a solid wall of rock, and this dividing wall rose to such a height upon the surface that the water would flow over the track of the defendant before passing into the quarry of the plaintiff. From the depression around the first abandoned quarry a culvert was constructed underneath the defendant's track. The claim of the defendant was that this culvert was sufficient to carry off the water which was conducted as above described into the first abandoned quarry, and there was no question but what it had proved sufficient from 1884, when the embankment was constructed, down to the time of the injury. In January, 1888, occurred a freshet which the witnesses described as the most serious ever known in that locality. In the course of this freshet large quantities of water ran down the hillside, were turned by the defendant's embankment, and discharged into the first abandoned quarry. This quarry was filled up by the unusual flood of water, and thereupon the water overflowed into the second abandoned quarry, rising in that quarry to a point considerably above that at which it ordinarily stood. From this quarry it burst through the dividing wall which separated it from the plaintiff's quarry, whereby the damage complained of was done. The evidence of the defendant tended to show that the ancestors of the plaintiff, at some time previous to the construction of the defendant's railroad, had, in the excavation of the plaintiff's quarry, encroached some 8 or 10 feet upon the lands of the Vermont Marble Company, and thereby so weakened the dividing wall that it had burst through under the pressure of the water. The defendant claimed that if the ancestors of the plaintiff had trespassed upon the lands of the Vermont Marble Company, and in so doing so weakened the dividing wall as to occasion the injury in question, the plaintiff could not recover, and requested the court to so instruct the jury. This the court declined to do, and instructed the jury that, in determining the issue involved, it was immaterial whether the plaintiff's ancestors had or had not worked over onto the land of the Vermont Marble Company, and that, if they had, it would be no defense to this action, to which the defendant excepted.

F. G. Swinington, for plaintiff. C. A. Prouty, for defendant.

ROWELL, J. It is a maxim of the law that the immediate, not the remote, cause of an event is regarded. In the application of this maxim, the law rejects, as not constituting ground for an action, damage not flowing proximately from the act complained of. In other words, the law always refers the damage to the proximate, not the remote, cause. It is laid down in many cases and by leading text writers that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable sequence of the negligence or the wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances; but this rule is no test in cases where no intervening efficient cause is found between the original wrongful act and the injurious consequences complained of, and in which such consequences, although not probable, have actually flowed in unbroken sequence from the original wrongful act. This is well illustrated by Stevens v. Dudley, 56 Vt. 158, which was this: Defendant was a marshal at the fair, and, in chaining the track for a race, he turned off a man's team so negligently that the man was thrown from his wagon, his horse broke loose, and ran against plaintiff's wagon, and injured him. The court below charged that defendant was not liable unless he might reasonably have expected plaintiff's injury to result from his act. Held error, and that the court should have charged that if the defendant negligently turned the team off the track, and thereby the team was deprived of the control of a driver, and became frightened, and ran over plaintiff's team, and caused the injury, without any superior, uncontrollable force, or without the negligence of a responsible agent, having intervened, the defendant would be liable, although he did not anticipate, and might not have anticipated, such consequences from his negligent act; in other words, that the court should have charged that if defendant's act was negligent, and in the natural order of cause and effect the plaintiff was injured thereby, the defendant was liable. Smith v. Railway Co., L. R. 6 C. P. 14, in the exchequer chamber, is to the same effect. There the company's workmen, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there for several days during very dry weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burned some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road, and burned plaintiff's cottage, 200 yards away from where the fire began. There was evidence that an engine had passed the spot shortly before the fire was first seen, but no evidence that it had emitted sparks, nor any further evidence that the fire originated from the engine; nor was there any evidence that the fire began in the heaps of trimmings, and not on the parched ground around them. The court below held that the plaintiff could not recover, because no reasonable man would have foreseen that the fire would consume the hedge, and pass across a stubble field, and so get to plaintiff's cottage, at a distance of 200 yards from the railway, crossing a road in its passage. In the exchequer chamber, Chief Baron Kelly said that he felt pressed, at first, by this view, because he then and still thought that any reasonable man might well have failed to anticipate such a concurrence of circumstances as the case presented; but that, on consideration, he thought that was not the true test of defendant's liability; that it might be that defendant did not anticipate, and was not bound to anticipate, that plaintiff's cottage would be burned as the result of its negligence; but yet, if it was aware that the heaps were lying by the side of the rails, and that it was a dry season, and that, therefore, by being left there, the heaps were likely to catch fire, defendant was bound to provide against all circumstances that might result from this, and was responsible for all natural consequences of it; and with this agreed all the judges. Channell, B., said that, where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering whether there is evidence for the jury of negligence or not; and Mr. Justice Blackburn said that what the defendant might reasonably anticipate was material only with reference to the question whether it was negligent or not, but could not alter its liability if it was negligent. In Rylands v. Fletcher, L. R. 3 H. L. 332, (in the house of lords,) Lord Cranworth says that, in considering whether a defendant is liable to a plaintiff for damage that the latter has sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts occasioned the damage; that this is all well explained in the old case of Lambert v. Bessey, T. Raym. 421, reported by Sir Thomas Raymond; that the doctrine is founded in good sense, for where one, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer; that he is bound so to use his own as not to injure another. In Smith v. Fletcher, L. R. 7 Exch. 305, defendants' mines adjoined and communicated with plaintiff's mines, and on the surface of defendants' land were certain hollows and openings, partly caused by defendants' workings, and partly made to facilitate them. Across the surface of defendants' land there ran a brook, which they had diverted from its original course into an artificial channel they had made, and which, by reason of exceptionally heavy rains, overflowed its banks, and quantities of water poured from it into said hollows and openings, where already the rains had caused an unusual amount of water to collect, and thence, through fissures and cracks, water passed into defendants' mine, and so into plaintiff's mine. If the land had been in its natural condition, the water would have spread over the surface, and done no harm. The defendants tendered evidence to show that they had taken every reasonable precaution to guard against ordinary emergencies, and that they had, by diverting and improving the water course, and otherwise, greatly lessened the chance of water escaping from the surface of the land into their own mines, and thence into the plaintiff's mine; and contended that they were not liable for the consequences of an exceptional flood. It was conceded that they had not been guilty of any personal negligence; but the court ruled that they were absolutely liable for the consequences, and rejected the evidence, and a verdict was taken for the plaintiff, which was allowed to stand. Baron Bramwell, in disposing of the case in banc, said that the defendants, for their own purposes, and without providing the means of its getting away without hurt, brought the water to the place whence it escaped, and did the mischief, and that that made a case against them calling for an answer, and that they answered: "We brought the water there, indeed, and did not provide a sufficient outlet for it; but, had we not altered the original course of the stream, it would have escaped in greater quantities, and done more mischief,"—which, he said, was no answer. See Cahill v. Eastman, 18 Minn. 324, (Gil. 292.)

In the case at bar the defendant, for purposes of its own, wrongfully turned the brook from its natural channel, and let it flow towards plaintiff's quarry, not knowing what would happen, whereby large and unusual quantities of water were brought to and accumulated in the marble company's abandoned quarries, and it was the duty of the defendants to see that no damage was thereby done; and the fact that it did not know, and had no reason to suspect, that the plaintiff's predecessors had worked their quarry out of bounds, and thereby weakened the wall between it and the adjacent quarry, makes no difference, unless such fact constitutes contributory negligence imputable to the plaintiff. Now, an act or omission of a party injured, or of those for whose acts and omissions he is responsible, in order to constitute contributory negligence, must have related to something in respect of which he or they owed to the defendant, or to those in whose shoes he stands, the duty of being careful, and have been negligent, and, in the production of the injury, have operated as a proximate cause, or as one of the proximate causes, and not have been merely a condition. It follows, therefore, that when there is no duty there can be no negligence. In working their quarry, the plaintiff's predecessors did not know, and could not possibly anticipate, the then nonexistent circumstances,—that years afterwards the defendant would build a new road where it did in 1884, and wrongfully turn the brook into the quarries above, whereby their quarry would be endangered if they weakened the wall by working out of bounds. Their act in this respect was not wrongful as to the defendant, and they owed the defendant no duty concerning it, and therefore negligence is not predicable of it, even though it was wrongful as to the marble company, with the rights of which the defendant in no way connects itself. The state of the wall, legally considered, was not a proximate cause of the injury, but was merely a condition that made the injury possible. Judgment affirmed.

KEEBLE v. KEEBLE.

(5 South. 149, 85 Ala. 552.)

Supreme Court of Alabama. Dec. 8, 1888.

Appeal from city court, Dallas county; John Haralson, Judge.

This was an action brought by the appellant, Henry C. Keeble, against the appellee, Julia P. Keeble, as the executrix of R. C. Keeble, deceased, for the recovery of money alleged to be due the plaintiff by the defendant's testator. The defendant pleaded the general issue, payment, accord and satisfaction, and set-off. The only question in the case arose on the instruction given the jury by the court, founded on the facts set out in the seventh plea. The demurrer to this plea was overruled by the court. It was, in substance, that plaintiff and defendant's testator had been in partnership in the mercantile business. Plaintiff sold out to defendant's testator, but was employed by the latter as business manager. The terms of the employment imposed on plaintiff the obligation to wholly abstain from the use of intoxicating liquors, and, in the event he should become intoxicated, that he should pay, "as liquidated damages," the sum of $1,000. The plea alleged that plaintiff violated his promise to keep sober, and thereby became bound to pay to defendant's testator said sum of $1,000, which sum was offered as a set-off to plaintiff's demand.

Mr. Roy and White & White, for appellant. Pettus & Pettus, for appellee.

SOMERVILLE, J. The only question in this case is whether the sum of $1,000, agreed to be paid by the appellant, Henry C. Keeble, to Richard C. Keeble, the testator of the appellee, as mentioned in the written contract of employment between the parties, is to be regarded by the court as a penalty or as liquidated damages. The city court held it, in effect, to be liquidated damages, by charging the jury to find for the defendant, if the facts set out in the seventh plea were satisfactorily proved. The solution of this question is one which the courts have often confessed embarrassment in determining. No one rule can be announced which will furnish a single test or criterion for all cases, but, in most cases, a multitude of considerations are to be regarded in seeking to reach the real intention of the parties. The following general rules may be deduced from the authorities, each having more or less weight, according to the peculiar circumstances of each case, and the nature of the contract sought to be construed: (1) The court will always seek to ascertain the true and real intention of the contracting parties, giving due weight to the language or words used in the contract, but not always being absolutely controlled by them, when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice. (2) The mere denomination of the sum to be paid as "liquidated damages," or as "a penalty," is not conclusive on the court as to its real character. Although designated as "liquidated damages" it may be construed as a penalty, and often when called a "penalty" it may be held to be liquidated damages, where the intention to the contrary is plain. (3) The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages; and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty. (4) Where the payment of a smaller sum is secured by an obligation to pay a larger sum, it will be held a penalty, and not liquidated damages. (5) Where the agreement is for the performance or non-performance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it, unless it is clear on other grounds that a penalty was really intended. (6) When the contract provides for the performance of several acts of different degrees of importance, and the damages resulting from the violation of some, although not all, of the provisions are of easy ascertainment, and one large gross sum is stipulated to be paid for the breach of any, it will be construed a penalty, and not as liquidated damages. (7) When the agreement provides for the performance of one or more acts, and the stipulation is to pay the same gross sum for a partial as for a total or complete breach of performance, the sum will be construed to be a penalty. (8) Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, are in contemplation. (9) Where the agreement is in the alternative, to do one of two acts, but is to pay a larger sum of money in the one event than in the other, the obligor having his election to do either, the amount thus agreed to be paid will be held liquidated damages, and not a penalty. (10) In applying these rules, the controlling purpose of which is to ascertain the real intention of the parties, the court will consider the nature of the contract, the terms of the whole instrument, the consequences naturally resulting from a breach of its stipulations, and the peculiar circumstances surrounding the transaction; thus permitting each case to stand, as far as possible, on its own merits and peculiarities. These rules are believed to be sustained by the preponderance of judicial decisions. Graham v. Bickham, 1 Am. Dec. 328, and note, pp. 331–340; Williams v. Vance, 30 Am. Rep. 26, and note, pp. 28–36; 1 Pom. Eq. Jur. §§ 440–446; McPherson v.

Robertson, 82 Ala. 459, 2 South. 333; Hooper v. Railroad Co., 69 Ala. 529; Watts v. Sheppard, 2 Ala. 425; Bish. Cont. § 1452; Curry v. Larer, 7 Pa. St. 470; Foley v. McKeegan, 4 Iowa, 1; Nash v. Hermosilla, 9 Cal. 584; Muse v. Swayne, 2 Lea, 251; 2 Greenl. Ev. § 258.

The appellant was in the employment of the appellee's testator as a business manager, at very liberal wages, having been a partner with him in the mercantile business, under the firm name of R. C. Keeble & Co. Although he was but an employé, having sold to R. C. Keeble his entire interest in the partnership business, he remained ostensibly a partner. The terms of the employment, reduced to writing, imposed on the appellant, Henry Keeble, the obligation, among other duties, "to wholly abstain from the use of intoxicating liquors," and "to continue and remain sober," giving his diligent attention to the business of his employer, and promising, in the event he should become intoxicated, that he would pay, "as liquidated damages," the sum of $1,000, which the testator, Richard Keeble, was authorized to retain out of a certain debt he owed the appellant. The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employés of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business. It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. Unless this view is correct, the application of the foregoing rules to the construction of the agreement manifestly stamps it as a stipulation for liquidated damages, and not a penalty. It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. This fact would, in our opinion, except the case from the operation of the rules above enunciated. There are but few agreements of this kind where the stipulation is to do or not do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a considerable sum. One may sell out the good-will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of his breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to practice one's profession as a physician or lawyer, not to run a steam-boat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. Williams v. Vance, 30 Am. Rep. 29–31, note; Graham v. Bickham, 1 Am. Dec. 336–338, note; 1 Pom. Eq. Jur. § 442, note 1. It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practice medicine, and possibly never interfere with the practice of the other contracting party; or law, without having a paying client; or he may run a steam-boat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the quantum of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties, under the rules above announced, designed it as a penalty. We may add, moreover, that no one can accurately estimate the physiological relation between private and public drunkenness, nor the causal connection between intoxication one time and a score of times. The latter, in each instance, may follow from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. The duty resting on the court, in all these cases, is to so apply the settled rules of construction as to ascertain the legally expressed and real intention of the parties. Courts are under no obligations, nor have they the power, to make a wiser or better contract for either of the parties than he may be supposed to have made for himself. The court below, in our judgment, did not err in holding, as it did, by its rulings, that the sum agreed to be paid the appellee's testator was liquidated damages, and not a penalty. Affirmed.

MONMOUTH PARK ASS'N v. WALLIS IRON WORKS.

(26 Atl. 140; 55 N. J. Law, 132.)

Court of Errors and Appeals of New Jersey. March 6, 1893.

Error to supreme court.

Action on a contract by the Monmouth Park Association against the Wallis Iron Works. Plaintiff had judgment, and defendant brings error. Reversed.

The other facts fully appear in the following statement by DIXON, J.:

The plaintiff brought an action in the supreme court against the defendant to recover $6,384.66, and interest, as a final balance for work done, chiefly, under a sealed contract between them, providing for the construction of a grand stand at the Monmouth Park race course. The present writ of error is prosecuted by the defendant to review questions of law raised at the trial in the Hudson circuit. The following is a copy of the contract:

"Articles of agreement made and concluded this first day of October, A. D. 1889, by and between the Wallis Iron Works, a corporation of New Jersey, of the first part, and the Monmouth Park Association, of the second part, witnesseth, that for and in consideration of the covenants and payments hereinafter mentioned, to be made and performed by the said party of the second part, the said party of the first part doth hereby covenant and agree to furnish all the labor and materials, and perform the work, necessary to complete, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of the said party of the second part, a grand stand at the race course of said party of the second part, at Monmouth Park, Monmouth Co., New Jersey, excepting the necessary excavation, incidental thereto; the said work to be finished as described in the approved plans and following specifications, and agreeably to the directions received from the said chief engineer, on or before the first day of March, 1890. In case the said party of the first part shall to fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as, in accordance with the provisions of this agreement, shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed, and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by way of penalty. And the said party of the second part may and shall deduct and retain the same out of any moneys which may be due or become due to the party of the first part under this agreement.

"Specification. The entire work to be constructed and finished, in every part, in a good, substantial, and workmanlike manner, according to the accompanying drawings and specifications, to the full extent and meaning of the same, and to the entire satisfaction, approval, and acceptance of the chief engineer and owners of the said party of the second part, and under the supervision and direction of such agent or agents as they may appoint. Additional detail and working drawings will be furnished, in exemplification of the foregoing, from time to time, as may be required; and it is distinctly understood, that all such additional drawings are to be considered as virtually embraced within, and forming a part of, these specifications. Figured dimensions shall in all cases be taken in preference to scale measurements. The said engineer shall have the right to make any alterations, additions, or omissions of work or materials herein specified, or shown on the drawings, during the progress of the structure, that he may find to be necessary, and the same shall be acceded to by the said party of the first part, and carried into effect, without in any way violating or vitiating the contract. If any additions, alterations, or omissions are made in the structure during the progress of the work, the value of such shall be decided by the said chief engineer, who shall make an equitable allowance for the same, and shall add the amount of said allowance to the contract price of the work, if the cost has been increased, or shall deduct the amount, if the cost has been lessened, as he, the said chief engineer, may deem just and equitable. The said party of the second part will pay for no extra work or material unless ordered in writing by them, through their treasurer. Any disagreement or difference between the parties to this contract, upon any matter or thing arising from these specifications, or the drawings to which they refer, or to the contract for the work, or the kind or quality of the work, required thereby, shall be decided by the said chief engineer of the party of the second part, whose decision and interpretation of the same shall be considered final, conclusive, and binding upon both parties. All materials and labor used throughout the structure must be of the best of their several kinds, and subject to the approval of the chief engineer. The said chief engineer shall have full power, at any time during the progress of the work, to reject any materials that he may deem unsuitable for the purpose for which they were intended, or which are not in strict conformity with the spirit of these specifications. He shall also have the power to cause any inferior or unsafe work to be taken down and altered at the cost of the said party of the first part. Particular care must be taken of all the finished work, which work must be covered up and thoroughly protected from injury or defacement, during the erection and completion of the structure. All refuse material and rubbish that may accumulate during the progress of the work shall be removed from time to time as may be directed by the chief engineer, and, on the completion of the work, the structure, grounds, and streets be thoroughly cleaned up, and the surplus material and rubbish removed. The said party of the second part will not transport free any of the workmen or materials for this work, but all materials must be shipped in the name of the party of the first part, and in no case shall it be shipped in care of, or in the name of, the company, or any of its officers or employes, and said party of the first part must pay the regular freight rates arranged for with the freight department.

"And the said party of the second part doth promise and agree to pay to the said party of the first part, for the work to be done under this contract, the following prices, to wit: One hundred and thirty-three thousand ($133,000) dollars. On or about the last day of each month, during the progress of this work, an estimate shall be made of the relative value of the work done and delivered, to be judged by the engineer; and ninety per cent. of the amount of said estimate shall be paid to the party of the first part on or about the fifteenth day of the following month. And when all the work embraced in this contract is completed, agreeably to the specifications, and in accordance with the directions, and to the satisfaction and acceptance, of the engineer, there shall be a final estimate made of said work according to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them, within thirty days thereafter, upon their giving a release, under seal, to the party of the second part, from all claims and demands whatsoever growing in any manner out of this agreement, and upon their procuring and delivering to the parties of the second part full releases, in proper form, and duly executed, from mechanics and material men, of all liens, claims, and demands for materials furnished and provided, and work and labor done and performed, upon or about the work herein contracted for under this contract. It is further covenanted and agreed between the said parties that the said party of the first part will at all times give personal attention, by competent representative, who shall superintend the work. It is further agreed that the contractors are not to interfere in any way with the construction of the bookmakers' stand, members' stand or the paddocks, or other work. It is further agreed and understood that the work embraced in this contract shall be commenced within ten days from this date, and prosecuted with such force as the engineer shall deem adequate to its completion within the time specified; and if at any time the said party of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of the said engineer, for its completion within the time specified in this agreement, then, in that case, the said engineer in charge, or such agents as the engineer shall designate, may proceed to employ such a number of workmen, laborers, and overseers as may, in the opinion of the said engineer, be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as he may find necessary or expedient to give, pay all persons so employed, and charge over the amount so paid to the party of the first part as for so much money paid to them on said contract, or for the failure to prosecute the work with an adequate force, for noncompliance with his directions in regard to the manner of constructing it, or, for any other omission or neglect of the requirements of this agreement and specifications on the part of the party of the first part, the said engineer may, at his discretion, declare this contract, or any portion or section embraced in it, void. And the said party of the first part hath further covenanted and agreed to take, use, provide, and make all proper, necessary, and sufficient precautions, safeguards, and protections against the occurrence or happening of any accident, injuries, damages, or hurt to any person or property during the progress of the construction of the work herein contracted for, and to be responsible for, and to indemnify and save harmless, the said parties of the second part, and the said engineer, from the payments of all sums of money by reason of all or any such accidents, injuries, damages, or hurt that may happen or occur upon or about said work, and from all fines, penalties, and loss incurred for or by reason of the violation of any city or borough ordinance or regulation or law of the state, while the said work is in progress of construction. And it is mutually agreed and distinctly understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same.

"In witness whereof, the parties herein named have hereunto set their seals, and caused their presents to be signed by their secretary, the day and year herein first above named. As to Wallis Iron Works, James I. Taylor. Wallis Iron Works. [Seal.] Wm. T. Wallis, Sec'y. The Monmouth Park Ass'n. [Seal.] By A. J. Cassatt, President. Witness to signature of A. J. Cassatt: T. M. Croft.

"It is hereby further agreed that, in addition to the work hereinbefore described and provided for, the said party of the first part shall provide as bearing pieces to receive ends of purlins, and in lieu of the angle irons already provided for, 3x6 angle irons, 10 8-10 lbs. per foot, and 7 feet long, well bolted to roof truss and to purlin ends. The party of the first part will also construct, complete, the front steps to grand stand, as per revised sheet No. 26. In consideration of the foregoing changes, the party of the second part agrees to pay the additional sum of nineteen hundred and seventy-one ($1,971.61) dollars. Wallis Iron Works. [Seal.] Wm. T. Wallis, Treas. [Seal.] The Monmouth Park Ass'n. By A. J. Cassatt, President. Witness this 11th day of December, 1889: T. M. Croft."

Added to this are "Revised Specifications," the last clause of which is: "Payments. On or about the first day of each month, the engineer will make an approximate estimate of the amount of work erected and delivered under these specifications during the preceding month, and the contractor will be paid ninety per cent. of the amount of these estimates. Thirty days after the acceptance of the completed work by the owner, the retained ten per cent. will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it." These specifications were also signed and sealed by the parties. The pleadings are sufficient to warrant the questions involved in the exceptions taken at the trial.

Jos. D. Bedle, for plaintiff in error. Gilbert Collins, for defendant in error.

DIXON, J. (after stating the facts). The first exception to be considered took its rise from the fact that the structure was not completed within the time limited by the contract, nor until 94 days after the expiration of a month's extension of that time. The defendant claimed a deduction or set off of $100 for each day's delay. The plaintiff met this claim by insisting that the clause in the contract mentioning the $100 per day is unintelligible, and therefore nugatory, because in its opening line it reads: "In case the said party of the first part shall * * * to fully and entirely," etc., omitting any effective verb. We agree, however, with the trial judge, in thinking that the context shows the verb which should be supplied. It makes the $100 payable for each day that "the party of the first part shall be in default." This plainly indicates the verb "fail" as the omitted word, to be supplied as an equivalent for the expression, "be in default." The right of a court of law to read an instrument according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the instrument, is sufficiently vindicated by the decision of this court in Sisson v. Donnelly, 36 N. J. Law, 432. See, also, Burchell v. Clark, 2 C. P. Div. 88.

Taking the clause thus perfected, the plaintiff urged that the $100 a day was a penalty; and so the trial judge ruled, requiring that the defendant should prove the actual damages, and be allowed only for what was proved. To this ruling the defendant excepted. In determining whether a sum which contracting parties have declared payable on default in performance of their contract is to be deemed a penalty, or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g. more than the legal rate for the nonpayment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain, or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful, on the whole agreement, whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text books, and recognized in the judicial Reports of this state. Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Whitfield v. Levy, 35 N. J. Law, 149; Hoagland v. Segur, 38 N. J. Law, 230; Lansing v. Dodd, 45 N. J. Law, 525. In the present case the default consists of the breach of a single covenant, to complete the grand stand as described in the approved plans and specifications within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand stand may be inferred from its cost,—$133,000. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the noncompletion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions, therefore, seem to have been such as to justify the parties in settling for themselves the measure of compensation. The stipulations of parties for specified damages on the breach of a contract to build within a limited time have frequently been enforced by the courts. In Fletcher v. Dyche, 2 Term R. 32, £10 per week for delay in finishing the parish church; in Duckworth v. Alison, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in Legge v. Harlock, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon shed, and granary; in Law v. Local Board (1892) 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage works; in Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256, $10 a day for delay in erecting dwelling houses; and in Malone v. City of Philadelphia (Pa. Sup.) 23 Atl. 628, $50 a day for delay in completing a municipal bridge,—were all deemed liquidated damages. Counsel has referred us to two cases of building contracts, where a different conclusion was reached: Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417, and Clements v. Railroad Co., 132 Pa. St. 445, 19 Atl. 274, 276. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable, and the stipulated sum was unconscionable. In the case at bar we have no data for saying that $100 a day was unconscionable. The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages. Their language seems, indisputably, to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer, they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages. But it is argued that as the contract authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself, in liquidated damages, for delay in completing such a changeable contract. But this argument seems to be aside from the present inquiry, which is, not whether the plaintiff became responsible for damages by reason of the noncompletion of the grand stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant. Certainly the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at $100 per day. We think the ruling at the circuit on this point was erroneous.

We think, also, that the letter, Exhibit P S, written September 10, 1890, by F. Latourette to the plaintiff, was illegally received in evidence. It was offered and admitted as a decision by the chief engineer of the defendant under the contract. Since it was written after the completion of the work, and after the writer had ceased to be the engineer of the defendant, and without notice to the defendant, it could not possess the character attributed to it.

The only other exception which it appears useful to notice is that relating to the existence of claims by outside parties. The agreement contains two clauses on this subject,—one under the head, "Specification;" the other, under the head, "Revised Specification." It seems proper to hold that the latter clause is substituted in the contract for the former, and therefore it only need be considered. It reads: "Thirty days after the acceptance of the completed work by the owner, the retained ten per cent. will be paid the contractor, upon his furnishing satisfactory evidence that no liens or unsatisfied claims exist on the work, or any part of it." The expression, "liens or unsatisfied claims on the work," must mean claims which can be enforced against the work, and such claims could exist only under our mechanic's lien law. By "liens" the parties intended claims filed under that law; by "unsatisfied claims," they intended claims which were not, but might be, filed under that law. The statute (Revision, p. 668, § 2) provides "that when any building shall be erected, in whole or in part, by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract: provided such contract, or a duplicate thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished;" and (section 13) "that no debt shall be a lien by virtue of this act unless a claim is filed as hereinbefore provided within one year from the furnishing the materials or performing the labor for which such debt is due." The contract between these parties was filed January 2, 1890. Hence no liens could arise in favor of outside parties for work done or materials furnished after that date. For work done or materials furnished before that date, no debt would be a lien unless a claim were filed within a year, i. e. before January 2, 1891. At the date last named, no such claim was filed, and, so far as appears, no such claim was ever filed. The suit was commenced March 12, 1891. We think these facts furnished satisfactory evidence that there were no liens or unsatisfied claims on the work when the action was brought, and that on this point there was no error at the trial.

The other exceptions adverted to by counsel for the defendant are either untenable, or on questions not likely to arise upon a new trial. Let the judgment be reversed, and a venire de novo be awarded.

KECK v. BIEBER.

(24 Atl. 170, 148 Pa. 645.)

Supreme Court of Pennsylvania. May 2, 1892.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Assumpsit by Emeline C. Keck against Sylvester Bieber on a bond whereby he promised to pay her $2,000 upon the non-performance of certain conditions. There was no dispute as to the breach of condition, and a verdict was directed for plaintiff for the full amount of the bond. From a judgment entered thereon, defendant appeals. Reversed.

Jas. S. Biery and Edward Harvey, for appellant. C. J. Erdman and R. E. Wright's Sons, for appellee.

MITCHELL, J. The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but, where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is but of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case. The subject has always presented difficulties in the formulation of a general rule, and especially in its application. The books are full of inharmonious decisions. In no state, however, have the difficulties been more successfully minimized than in Pennsylvania, and in no case that I have seen is there a better generalization than that by Agnew, J., in Streeper v. Williams, 48 Pa. St. 450: "In each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." The only criticism to which this would seem to be fairly open is that it does not perhaps give sufficient prominence to the intention of the parties as the controlling element, and it should therefore be read in connection with the restatement of it by our late Brother Clark, in March v. Allabough, 103 Pa. St. 335: "The question * * * is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction." The intent of the parties being, therefore, the principal object of ascertainment, Greenleaf lays down certain rules as the result of the cases, and, among them, that the sum is to be taken as a penalty "where the agreement contains several matters of different degrees of importance, and yet the sum named is payable for the breach of any, even the least." 2 Greenl. Ev. § 258. This rule is approved in Shreve v. Brereton, 51 Pa. St. 175, and the present case falls exactly within it. The conditions of the appellant's bond are two—First, he is to "save, defend, keep harmless, and indemnify the said Emelina C. Keck" from liability by reason of the assignment to him over the head of Neiser, and the termination of the latter's mining rights. This is clearly a covenant for indemnity only, and, as no breach was assigned, need not be further discussed. But, secondly, he is to pay the royalty accruing in the future, and "keep and perform all the covenants, conditions, and stipulations of the said lease and assignment." Turning now to the lease, we find that plaintiff's covenants with Kemmerer, which appellant thus bound himself to keep and perform, were to save harmless and indemnify him against all costs and damages to his neighbors from the washing of the ore, to run the water in such places as the lessor should order, to pay a stipulated royalty, to fill up holes made and left in the search for ore, to produce or pay royalty upon a minimum of one thousand tons a year, "to use the old wagon road for hauling said iron ore, and, in case there are gates or bars on said road, * * * to keep said gates and bars in repair, * * * and keep them shut when through," etc. The assignment adds to these a covenant to pay plaintiff, the assignor, an additional royalty upon a sliding scale of the price of ore per ton. No better illustration of the propriety of the rule referred to could be stated. Here are numerous covenants of the most varied kinds and importance. The covenants to indemnify against claims by Neiser, and against damages to the neighbors by the operation of washing, are undertakings which may be of serious magnitude; and under Dick v. Gaskill, 2 Whart. 184; Shreve v. Brereton, 51 Pa. St. 175; Moore v. Colt, 127 Pa. St. 289, 18 Atl. 8,—and similar cases, the recovery for a breach would probably not be limited by the sum named in the bond. On the other hand, the covenants to fill up the holes made in prospecting for ore, and to keep the gates on the old wagon road in repair and shut, are against such trivial inconveniences that it would savor of absurdity to suppose that the parties meant to stipulate for $2,000 damages for the breach of any one of them. We are therefore of opinion that defendant's fourth point, that the contract of the parties was for a penalty, should have been affirmed. It will not follow, however, as appellee seems to fear, that her recovery must be limited to the loss of the royalty due her at the time of bringing suit, and that she must bring repeated suits for future failures to pay. The defendant has, by his acts, disabled himself absolutely and permanently from performance of his covenants. Under such circumstances, the plaintiff may sue on the contract from time to time for the royalties due, and for such other damages as she may suffer, or she may, at her election, treat the contract as rescinded, and claim damages in one action for the entire breach. Judgment reversed, and venire de novo awarded.

TENNESSEE MANUF'G CO. v. JAMES.

(18 S. W. 262, 91 Tenn. 154.)

Supreme Court of Tennessee. Jan. 26, 1892.

Error to circuit court, Davidson county; W. K. McAllister, Judge.

Action by Minnie James, a minor, by her next friend, against the Tennessee Manufacturing Company, to recover on a *quantum meruit* for work and labor performed by her for defendant. Judgment for plaintiff, and defendant brings error. Reversed.

Dickinson & Frazer, for plaintiff in error. E. J. Wickware, for defendant in error.

LURTON, J. Minnie James, a minor, was an employe of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing, and was with the minor and her father. By one of the provisions of the contract it was stipulated that the employe should give two weeks' notice of her intention to quit. It is further provided that, in case she should leave without giving two weeks' notice, "or fail or refuse to faithfully work during a period of two weeks after giving notice of an intention to leave, * * * then it is hereby agreed that the amount stated below for the class to which I may belong is agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss, arising from my failure to carry out the terms of this agreement; and it is further agreed upon that said amount, applicable to the class of employes to which I may belong, shall be deducted from any sum which may be due me by said company, whether on account of services rendered or otherwise." The class to which appellee belonged was that of those receiving 50 cents per day and under $1. The damages stipulated for this class was $10. At the foot of this agreement, which was signed by appellee, was this further agreement signed by her father: "The foregoing agreement has been read by me, and, fully understanding the same, it is also agreed to by me, as binding both me and my daughter, Minnie James, who is legally disqualified from making this contract, to all its terms and conditions. I agree, further, that said Minnie James is hereby authorized to receive the wages of said work, and that all sums paid to said employe are to be accepted as fully discharging all liability, to the full amount so paid; and said wages are to be subject to all the conditions of this contract, as though said employe was legally empowered to act in person." Appellee gave notice of her intention to leave, and thereafter worked 10 days, but at the end of that time quit without any excuse. At the time she quit there was due her 20 days' wages, including the 10 days after her notice. If the stipulation as to damages is invalid, then the company is due her $10; if valid, then nothing is due her. Upon quitting she brought suit, by her father as next friend, upon a *quantum meruit*. The contract has been set up as a defense to her suit.

The circuit judge being of opinion that the contract was invalid, as being one with a minor who had a legal right to repudiate same, gave judgment for the plaintiff. In this we think his honor erred. If the contract had been alone with the minor, she might undoubtedly repudiate it, and recover upon a *quantum meruit*. The law would give the infant the privilege of judging whether such a contract was beneficial or not, and of avoiding it if she elected to do so, and recovering the value of her services as if she worked without any contract. 10 Amer. & Eng. Enc. Law, tit. "Infant." But this contract was in law with the father, who agreed that the wages in law due to him might be paid over to his child, "subject to all the conditions of this contract." The wages of a minor, peculiar circumstances out of the way, are due to the father. This springs from his legal duty to support and educate his child. He may permit the minor to take and use his own earnings. This is called "emancipation," and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied; entire or partial. It may be conditional. It may be in writing or oral; for the whole minority or for a shorter term; as to a part of the child's wages or as to the whole. Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. Bish. Cont. § 898. If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation. These principles of the common law are well settled, and have not been affected by statute. Cloud v. Hamilton, 11 Humph. 105. The cases in America are collected in a note to Wilson v. McMillan, 35 Amer. Rep. 117.

In view of these principles, we must construe the contract of the father as an emancipation, subject to the conditions as to damages in case his child shall quit without cause and without the stipulated notice. It is as much as if he had said: "My child is a minor. As such, I am entitled to her wages. I am willing that she shall work in your mill, and that the wages she may earn shall be paid to her. I agree that she shall comply with this contract, and, if she does not, then the wages legally due me shall be detained by you to the extent provided in the contract I make for her, and only such wages paid to her as I would be entitled to receive if the contract were exclusively with me." This was a conditional emancipation, under a special contract made by and with the father for himself and his child. Her emancipation was partial. The father, having a legal right to her entire wages, has stipulated that none shall be paid her beyond the sum due under this agreement with him. If this contract is binding on him, the minor cannot recover beyond its limits. If the contract is invalid as to him, as stipulating for a penalty, then it will not be in the way of plaintiff's suit. We agree with the circuit judge in holding that this contract does not fall within the case of Schrimpf v. Manufacturing Co., 86 Tenn. 219, 6 S. W. Rep. 131. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract harsh and unconscionable. It preserved no proportion between the sum forfeited and the actual damages, and put all employes upon same footing, whether much or little was earned, much or little due, when breach occurred. The damages were to be all that was due, in any case. To one, this might have been the wages of months; to another, the earnings of but a day. But in that case Chief Justice TURNEY quoted and indorsed the language of CAMPBELL, J., in Richardson v. Woehler, 26 Mich. 90, where he said: "We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable or an oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected." Applying these principles to the case for judgment, we have no difficulty in holding that the stipulation here is for liquidated damages, and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, do not exist when the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably." 1 Suth. Dam. 490. This contract of employment on its face affords no *data* by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton-mill, having in its employment hundreds of hands. The work is divided into many departments. The raw material is handled by one set of hands, and put in condition for another, and the second department still further advances its manufacture; and so on, through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employe's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill, and throw other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employes exists, which they ought and do recognize, and which makes the obligation of each to the whole, and to the common employer, all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, require the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employe, and hence presumably with regard to the particular results of a breach in each department. There is no hardship in the agreement requiring 2 weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out.

That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretense of excuse, or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her. Reverse. Judgment here for plaintiff in error.

TODE et al. v. GROSS.

(28 N. E. 469, 127 N. Y. 480.)

Court of Appeals of New York, Second Division. Oct. 6, 1891.

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court after a trial without a jury. Affirmed.

Action for breach of covenant to recover the sum of $5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good-will, custom, trade-marks, and names used in and belonging to the said business," for the sum of $25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said county of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part, [plaintiffs,] impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them, and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same." Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, &c.,' * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of $5,000 as stipulated damages.

John Fennel, for appellant. Henry Bacon, for respondents.

VANN, J. (after stating the facts). The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. Rep. 335; Leslie v. Lorillard, 110 N. Y. 519, 534, 18 N. E. Rep. 363; Thermometer Co. v. Pool, (Sup.) 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant, by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of $5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person. The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. Bagley v Peddie, 16 N. Y. 469; Dakin v. Williams, 17 Wend. 448, affirmed 22 Wend. 201; Wooster v. Kisch, 26 Hun, 61. As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except BROWN J., not sitting.

CONDON v. KEMPER.

(27 Pac. 829, 47 Kan. 126.)

Supreme Court of Kansas. Oct. 10, 1891.

Error from district court, Labette county; GEORGE CHANDLER, Judge.

This was an action brought in the district court of Labette county by L. H. Kemper against C. M. Condon to recover $500 as liquidated damages for the alleged breach of the following written contract, to-wit: "This agreement between L. H. Kemper and C. M. Condon witnesseth, that whereas, the said Kemper has sold to said Condon lot 7, block 38, in Oswego, Kansas, said Condon, as a part of the consideration therefor, agrees to erect thereon a two-story stone or brick building, not less than 100 feet deep, within six months, and to give use of the north wall thereof to said Kemper; or else remove the house now on lot 6, in said block 38, three feet north of where it now stands, as said Condon shall elect to do, and put said building in as good condition as it is in its present location. It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract. C. M. CONDON. Oswego, Kansas, March 11, 1887." The defendant answered as follows: "Said defendant admits the execution and delivery of the writing marked 'Exhibit A,' attached to and made part of plaintiff's petition, but he alleges the fact to be that said writing was executed and delivered under a misapprehension and a mistake of the facts in reference to the subject-matter of the transaction therein referred to as they actually existed, and that but for such mistake such writing would not have been executed. Defendant alleges that plaintiff was the owner of lots 6 and 7, in block 38, in the city of Oswego, Kansas. That the frame house mentioned in said writing belonged to plaintiff, and was appurtenant to said lot 6. That defendant negotiated for and purchased from plaintiff said lot 7 with a view of erecting thereon a stone or brick building. That at the time of purchasing said lot 7, and of executing and delivering said writing, both plaintiff and defendant understood and believed that said frame house, mentioned in said writing, and which belonged on and was appurtenant to said lot 6, stood on the line between said lots 6 and 7; the main part of it being, as said parties supposed, on lot 6, and about two or three feet in width of it standing on said lot 7. That to permit defendant to build on his said lot 7 would necessitate the removal of said house, as said parties believed, some three feet to the north. That plaintiff sold, and defendant bought, said lot under such belief. That plaintiff, in negotiating for the sale of said lot 7, objected to being put to the expense of removing said house so that it would all stand on his own lot 6, or insisted, if he were put to such expense, he should be compensated therefor; and to this defendant assented, and agreed that he would, at his own expense, remove said frame house so that it should entirely stand on said lot 6, and far enough across the line between said lots 6 and 7 not to interfere with the erection of a wall on said line, and put it in as good condition as it then was, where it then stood; or if he should so elect, instead of removing and repairing said house as aforesaid, he might erect on said lot 7 a brick or stone building not less than 100 feet deep, and give plaintiff the use of the north wall thereof as compensation for his moving and repairing said house as aforesaid. That it was to meet such contingency, and secure such end, that said writing was executed and delivered. That thereafter this defendant elected not to erect said stone or brick building on said lot 7, and not to furnish plaintiff the use of the north wall thereof. That, by agreement between said plaintiff and defendant, said block was afterwards surveyed, and the fact was then ascertained that said frame building did not stand, as both of said parties had supposed it did, across the line between said lots 6 and 7,—a part on 6 and a part on 7,—but that it all then stood on said lot 6, and so far from the line between lots 6 and 7 as not to interfere with the erection of a wall thereon, and therefore a removal of said frame building was unnecessary, and would be of no advantage whatever to plaintiff. Defendant alleges that the only purpose on the part of plaintiff or defendant in the execution and delivery of said writing was to indemnify plaintiff against cost and expense in the removal and repair of said house as aforesaid, and that, had plaintiff desired its removal after the fact in reference to its true location was ascertained, he could have had it removed three feet north of where it then stood, and put in as good condition as it was, where it then stood, at a cost and expense of not to exceed one hundred dollars. That said house could, at the time of the execution of said writing, or at any time since then, have been removed three feet north of where it then stood and now stands, and put in as good condition as it then was, in its then location, at a cost of not to exceed one hundred dollars. That in no event could plaintiff's damage, had he desired to have had said house removed, exceed one hundred dollars. That to indemnify against such possible damage was the only object in giving said writing. Defendant alleges that plaintiff has not removed said house, and has in no way been to any cost or expense on account of the removal of said house, or for any other purpose referred to in any way in said writing. Defendant denies that plaintiff has suffered any damage on his account, and denies any liability to him in any respect. Wherefore defendant asks that this cause be dismissed, and that he recover his costs herein." The plaintiff replied, denying every allegation of the answer inconsistent with the allegations of his petition. At the February term, 1889, when the case was called for trial, the plaintiff moved for judgment upon the pleadings; and the court sustained the motion, and rendered judgment accordingly in favor of the plaintiff and against the defendant for $500, with interest and costs; the defendant excepted, and afterwards, as plaintiff in error, brought the case to this court for review.

Case & Glasse, for plaintiff in error. J. H. Morrison, for defendant in error.

VALENTINE, J. (after stating the facts as above). The substantial question involved in this controversy is whether the plaintiff below, L. H. Kemper, may recover from the defendant below, C. M. Condon, the sum of $500 as agreed and liquidated damages, or whether he can recover only the amount of his actual loss or damage resulting from the breach of the contract sued on, which amount, according to the facts of the case as presented to us, cannot exceed $100. The contract upon which Kemper seeks to recover contains the following among other stipulations: "It is mutually agreed between said parties that a failure on the part of said Condon to perform these obligations shall entitle said Kemper to recover from him the sum of five hundred dollars as liquidated and ascertained damages for the breach of this contract." It will be seen that the parties themselves have used the words "liquidated and ascertained damages;" but nearly all the authorities agree that neither these words, nor any other words of similar import, are conclusive, but that the amount named, notwithstanding the use of such words, may nevertheless be nothing more than a penalty. Some of such authorities are the following: Lampman v. Cochran, 16 N. Y. 275; Ayres v. Pease, 12 Wend. 393; Hoag v. McGinnis, 22 Wend. 163; Beale v. Hayes, 5 Sandf. 640; Gray v. Crosby, 18 Johns. 219; Jackson v. Baker, 2 Edw. Ch. 471; Shreve v. Brereton, 51 Pa. St. 175; Fitzpatrick v. Cottingham, 14 Wis. 219; Fisk v Gray, 11 Allen, 132; Wallis v. Carpenter, 13 Allen, 19; Ex parte Pollard, 2 Low. 411; Basye v. Ambrose, 28 Mo. 39; Carter v. Strom, 41 Minn. 522, 43 N. W. Rep. 394; Schrimpf v. Manufacturing Co., 86 Tenn. 219, 6 S. W. Rep. 131; Haldeman v. Jennings, 14 Ark. 329; Davis v. Freeman, 10 Mich. 188; Hahn v. Horstman, 12 Bush, 249; Low v. Nolte, 16 Ill. 475; Kemble v. Farren, 6 Bing. 141; Davies v. Penton, 6 Barn. & C. 216; Horner v. Flintoff, 9 Mees. & W. 678; Newman v. Capper, 4 Ch. Div. 724. Of course, the words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received, or recovered, must be given due consideration, and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty; and this, even if the parties should name such amount "liquidated damages." The following text-books upon this subject may be examined with much profit: 1 Sedg. Dam. (8th Ed.) c. 12, §§ 389–427; 1 Suth. Dam. pp. 475–530, c. 7, § 6; 13 Amer. & Eng. Enc. Law, pp. 857–868; 1 Pom. Eq. Jur. §§ 440–447; 3 Pars. Cont. pp. 156–163, § 2. The text-books upon this subject unite in saying that the tendency and preference of the law is to regard a stated sum as a penalty, instead of liquidated damages, because actual damages can then be recovered, and the recovery be limited to such damages. 1 Suth. Dam. 490; 13 Amer. & Eng. Enc. Law, pp. 853, 860. The decisions of this court are also in this same line. The only decisions of this court upon the subject of liquidated damages are the following: Kurtz v. Sponable, 6 Kan. 395; Foote v. Sprague, 13 Kan. 155; Railway Co. v. Shoemaker, 27 Kan. 677; Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. Rep. 135. We are satisfied with the foregoing decisions of this court, but they do not go to the extent of controlling the decision in the present case. The last case cited is supported by the following additional cases: Davis v. Gillett, 52 N. H. 126; Caswell v. Johnson, 58 Me. 164; Burrill v. Daggett, 77 Me. 545, 1 Atl. Rep. 677.

In 1 Sedgwick on Damages (8th Ed.) the following among other language is used: "From the foregoing we derive the following as a general rule governing the whole subject: Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages." Section 405. "And here we are brought back by a somewhat circuitous path to the great fundamental principle which underlies our whole system,—that of compensation. The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties themselves keep this principle in view, they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum out of all proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements, therefore, fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does so, the sum fixed is necessarily a penalty. If it does not do so, the question arises, as in any other contract, as to what agreement the parties have actually made; and here, as in all other cases, their intention, as ascertained from the language employed, is a guide." Section 406. "Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages." Section 410. "Whenever an amount stipulated is to be paid on the non-payment of a less amount, or on default in delivering a thing of less value, the sum will generally be treated as a penalty." Section 411. "Whenever the stipulated sum is to be paid on breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages." Section 412. "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Section 413. "If the contract is one in which the measure of damages for part performance is ascertainable, and a sum is stipulated for breach of it, this sum will not be allowed as liquidated damages, in case of a partial breach." Section 415.

In 1 Pomeroy on Equity Jurisprudence the following language is used: "Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or all of such provisions, and the sum will be in some intances too large, and in others too small, a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. This rule has been laid down in a somewhat different form, as follows: Where the agreement contains provisions for the performance or non-performance of acts which are not measurable by any exact pecuniary standard, and also of one or more other acts in respect of which the damages are easily ascertainable by a jury, and a certain sum is stipulated to be paid upon a violation of any or of all these provisions, such sum must be taken to be a penalty." Section 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect, that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." Section 444.

In Sutherland on Damages the following among other language is used: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case." Page 478. "To be potential and controlling that a stated sum is liquidated damage, that sum must be fixed as the basis of compensation, and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitory. Parties may liquidate the amount by previous agreement. But, when a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded, and the stated sum treated as a penalty. Contracts are not made to be broken; and hence, when parties provide for consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum absolutely to be paid. The intention in all such cases is material; but, to prevent a stated sum from being treated as a penalty, the intention should be apparent to liquidate damages in the sense of making just compensation. It is not enough that the parties express the intention that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it be paid. It is intrinsically a different thing, and the intention that it be paid cannot alter its nature. A bond, literally construed, imports an intention that the penalty shall be paid if there be default in the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of contract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of the actual loss finally sustained." Pages 480, 481. See also, especially, 3 Parsons on Contracts (16th Ed., p. 156 et seq.)

Many courts hold that the intention of the parties must govern, but say that if the damages stipulated to be paid, received, or recovered on the breach of the contract are out of proportion to the actual damages that might be sustained, then the parties could not in fact have intended liquidated damages, but merely a penalty, whatever their language might be. Other courts hold that it makes no difference what the intention of the parties might be; that the nature of the contract itself must govern, and if the amount stipulated to be paid, received, or recovered is out of all proportion to the actual damages that might be sustained; then that such amount must be treated as a penalty, whatever may have been the intention of the parties; that in fact, and in the very nature of things, such amount would be a penalty, and could not be anything else; that the parties could not by misnaming the amount, and calling it liquidated damages, make it such. In this connection, the following language of Judge CHRISTIANCY, who delivered the opinion of the court in the case of Jaquith v. Hudson, 5 Mich. 123, 136, 137, is instructive: "Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty. The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages. It must therefore, we think, be very obvious that the actual intention of the parties in this class of cases, and relating to this point, is wholly immaterial; and, though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and cannot be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' Horner v. Flintoff, 9 Mees. & W. 678, per PARKE, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?" And in the case of Myer v. Hart, 40 Mich. 517, 523, the supreme court of Michigan held as follows: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."

We might quote further from the text-books and the reported cases, but we think the foregoing is sufficient; and from the foregoing it certainly follows that the plaintiff below, Kemper, cannot "recover" "the sum of $500 as liquidated and ascertained damages for the breach of this contract," notwithstanding such is the language of the contract. If the defendant, Condon, had removed the building situated on lot 6 three feet north, and had then put the same in as good condition as it was before, he would have so completed his contract that not one cent of damage could be recovered from him; and to so remove such building, and to put it in as good condition as it was before, would not have cost to exceed $100. But suppose that Condon had removed the building, and then have failed to put the same in as good condition as it was before; he would have committed a breach of the contract, but the actual damages might not have been $25. Then, should the plaintiff, Kemper, recover the said sum of $500? Or suppose that Condon had removed the house, and attempted to put it in as good condition as it was before, but have failed to repair a lock, or a small portion of the plastering, or a broken window, which repairing might not have cost $1; then, should Kemper have the right to recover the said sum of $500? All this shows that the parties did not have in contemplation the matter of actual compensatory damages when they stipulated that Kemper might recover $500 from Condon as liquidated and ascertained damages, in case of a breach of the contract, but shows that in fact, though not in words, they fixed the sum of $500 as a penalty to cover all or any damages which might result from a breach of the contract. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

SMITH v. BERGENGREN.

(26 N. E. 690, 153 Mass. 236.)

Supreme Judicial Court of Massachusetts.
Essex. Feb. 24, 1891.

Exceptions from superior court, Essex county; EDGAR J. SHERMAN, Judge.

Action by J. Ranlett Smith against Frederick W. A. Bergengren for breach of an agreement not to practice medicine in Gloucester. The court ruled that the sum of $2,000, named in the agreement, was liquidated damages, and defendant excepts.

F. L. Evans and *H. P. Moulton*, for plaintiff. *Ira B. Kieth* and *W. H. Niles*, for defendant.

HOLMES, J. The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, "but not otherwise." This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.

The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than $2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. St. Albans v. Ellis, 16 East, 352; Stevinson's Case, 1 Leon. 324; Bank v. Marshall, 40 Ch. Div. 112.

If the sum had been fixed as liquidated damages, the defendant would have been bound to pay it. Cushing v. Drew, 97 Mass. 445; Lynde v. Thompson, 2 Allen, 456; Holbrook v. Tobey, 66 Me. 410. But this case falls within the language of Lord MANSFIELD in Lowe v. Peers, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a court of equity will relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of the agreement." See, also, Ropes v. Upton, 125 Mass. 258, 260. The ruling excepted to did the defendant no wrong. In the opinion of a majority of the court, the exceptions must be overruled.

BETHEL et al. v. SALEM IMP. CO.

(25 S. E. 304, 93 Va. 354.)

Supreme Court of Appeals of Virginia. July 9, 1896.

Error to circuit court, Roanoke county; Henry E. Blair, Judge.

Action by George W. Bethel & Co. against the Salem Improvement Company. There was a judgment for plaintiffs, and they bring error. Affirmed.

G. W. & L. C. Hansbrough and Scott & Staples, for plaintiffs in error. R. H. Logan, A. B. Pugh, and Phlegar & Johnson, for defendant in error.

KEITH, P. On the 20th of January, 1891, the Salem Improvement Company entered into a contract, under seal, with George W. Bethel & Co., by which the latter agreed to make and burn for the former 1,500,000 bricks during the summer of 1891; the Salem Improvement Company agreeing to pay $6.50 per 1,000 for the bricks in the kiln, provided "the brick should not run less than two-thirds well-burned, hard bricks; that the bricks are to be examined when the kiln is burned, and, if approved by the Salem Improvement Company, it is to pay Geo. W. Bethel & Co. for three-fourths of their value, at the price aforesaid, but if, upon opening the kiln and hauling the bricks, they are found to be imperfect, and not equal to the standard above named, the Salem Improvement Company shall have the power of rejecting them." George W. Bethel & Co., under this contract, burned 803,491 bricks, and received therefor $3,212.31. A disagreement having arisen between the parties as to their rights under this contract, G. W. Bethel & Co. on the 5th day of March, 1892, brought an action of covenant against the Salem Improvement Company, and after setting out in their declaration the terms of the contract just stated, and referring to the contract itself for the complete provisions thereof, they aver that, except in so far as they have been prevented by the defendant, they have always well and truly performed all things in the said contract on their part to be done, according to its tenor and effect, but that the defendant has not hitherto performed and kept its covenants in the said contract contained, according to the true intent and meaning of the same, "in this: that after the said plaintiffs had, according to the tenor of the contract aforesaid, manufactured 803,491 bricks, and when they were proceeding with the manufacture of the residue of the said 1,500,000 bricks, the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same, and that the said defendant, although the said 803,491 bricks, made according to this contract, were kilned on the said premises according to the provisions of the said contract, the said defendant hath not paid to the said plaintiffs the sum of $6.50 per thousand for 1,500,000 bricks above mentioned, nor any part of said sum, except the sum of $3,212.31, whereby the plaintiffs have been damaged on account of the failure to pay for the bricks actually manufactured as aforesaid, by the outlay necessarily incurred by them in the preparation for the manufacture of the residue of the said bricks, and the failure of the defendant to allow the plaintiffs to continue the manufacture of the residue of the said 1,500,000 bricks, or to pay the plaintiffs their reasonable profit, to wit, the sum of $3 per thousand for the same to be manufactured." The second count, after setting out the contract, states the breach as follows: "In this: that the said defendant, as soon as the said plaintiffs had manufactured the 803,491 bricks mentioned in the first count, and when they had gone to the expensive preparation to manufacture the residue of the 1,500,000 aforesaid, and were proceeding with the manufacture of the same, the said defendant notified the said plaintiffs not to manufacture any more bricks than they had already manufactured, and that it would not purchase nor pay for any bricks thereafter manufactured; and the said defendant, although the said plaintiffs had manufactured and kilned the said 803,491 bricks, which were not less than two-thirds well-burned, hard bricks, and had in every way complied with the said contract on their part to be performed, except as aforesaid, hath not paid to the said plaintiffs the sum of $6.50 per thousand for 1,500,000 bricks as aforesaid, or any part thereof, except the sum of $3,212.31, in the first count mentioned." The third count, after reciting the contract, states the breach thereof in the following language: "In this: that the said defendant hath not purchased of the said plaintiffs the said 1,500,000 bricks, nor paid to the said plaintiffs the said sum of $6.50 per thousand for said 1,500,000 bricks, whereby the said plaintiffs were put to heavy costs and expenses, and incurred heavy losses, in and about performing the covenant in the said contract on their part to be performed, to wit, the sum of $4,000.00." To this declaration the defendant filed several pleas, about which no question was made, and upon these pleas the plaintiffs joined issue; and thereupon a jury was impaneled, which, after hearing the evidence, and the instructions from the court, found a verdict for the plaintiffs, and assessed their damages at the sum of $4,000. The defendant moved for a new trial, which the court, after consideration, granted, upon the ground, as stated in its order, that it had erroneously instructed the jury. To the ruling of the court setting aside the verdict, the plaintiffs excepted. At a subsequent term the whole matter of law and fact arising upon the case was submitted to the judge on the evidence given at the former trial, as the same appears in the bill of exceptions filed at that term. Thereupon the court proceeded to give judgment for the plaintiffs in the sum of $1,-

403.04, with legal interest thereon from January 1, 1892, till paid, and their costs therein expended. The plaintiffs again excepted, and tendered their bill of exceptions, which was allowed by the court, whereupon the plaintiffs applied to one of the judges of this court for a writ of error, which was granted.

The errors assigned here are—First, to the action of the court in setting aside the verdict rendered in behalf of the plaintiffs, their contention being that there was no error in the instructions given by the court, and that it should have given judgment in their favor upon the verdict as rendered by the jury; and, secondly, that it was error in the court to give its final judgment for $1,403.04, but that it should have been for the sum of $3,746.07, with interest from January 1, 1892, till paid.

The instruction given by the court, and which it afterwards decided was erroneous, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiffs, up to the time they stopped the manufacture of bricks, had been manufacturing them according to the requirement of the contract, or that the bricks so manufactured had been accepted by the defendant, and that the defendant refused and failed to pay the plaintiffs the sums of money, if any, due them under said contract, as the said sums became due, and by reason of such failure the plaintiffs were forced to stop, and did stop, the manufacture of bricks, then the plaintiffs are entitled to recover for the price of the bricks manufactured by them, according to the said contract, and for the profit on the difference between the number of the bricks so manufactured by them, and 1,500,000 bricks, manufactured according to the terms of the contract; and in estimating such profit the jury shall place the bricks at the price fixed in the said contract, and deduct therefrom the cost of said bricks, as they shall believe such cost to be from the evidence." This instruction is predicated upon the performance on the part of the plaintiffs of the conditions set out in their covenant, and upon the failure of the defendant to pay to the plaintiffs the sums of money due them under the contract, as the same became payable. It is claimed by the defendant in error that this instruction was erroneous, for two reasons: First, that there was no such issue presented by the pleadings; the breach laid in the declaration being that the defendant had failed to perform the covenants in the said contract on its part to be performed, in this: "That the said defendant notified the plaintiffs that it would not purchase any more of the said bricks than had already been made, and to discontinue the manufacture of the same." The theory upon which this action was brought, as appears from the declaration, was that the plaintiffs were entitled to recover because the defendant had broken its contract, not by failure to pay for the bricks manufactured, but by its notification to the plaintiffs that it would not purchase any more of the bricks than had already been made, and to discontinue the manufacture of the same. Had this breach been established by the evidence, there is abundant authority to warrant the verdict and judgment for the plaintiffs, upon proper instructions; but, as has already been observed, the instruction under consideration is predicated solely upon the performance by the plaintiffs of the covenants and conditions to be performed on their part, and the refusal and failure of the defendant to pay to the plaintiffs such sums of money as were due them under the contract, as the same became payable. The failure to pay the money is the cause alleged in the instruction, that forced the plaintiffs to stop the manufacture of the bricks, and which entitles the plaintiffs to recover, not only for the bricks manufactured by them according to said contract, but for the profit on the difference between the number of the bricks so manufactured by them, and the 1,500,000 bricks manufactured according to the terms of the contract, to be ascertained by placing the bricks at the price fixed in the contract, and deducting therefrom the cost of the bricks as shown by the evidence. For the breach of contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only. Wood's Mayne, Dam. (1st Am. Ed.) p. 15. That this is the rule is admitted. That there are exceptions to it may also be conceded, and it is earnestly contended on behalf of plaintiffs in error that the case before us comes within the exception, and not within the rule. In support of this contention the case of Masterton v. Mayor, etc., 7 Hill, 61, is relied upon. That was an action of covenant, on an agreement whereby the plaintiffs undertook to furnish, cut, fit, and deliver all the marble to build the city hall of Brooklyn, to be of the best kind of white marble, from Kain & Morgan's quarry, for which the defendants agreed to pay a certain sum in installments, payable at different stages in the erection of the building. The defendants suspended work on the building, for the want of funds, and refused to receive or pay for any more marble. This was the breach complained of. Part of the marble had at that time been delivered and paid for, another part was ready for delivery, but the greater part had not yet been procured and prepared for delivery. The plaintiffs, as a part of their case, put in evidence articles of agreement between them and Kain & Morgan, made on the faith of the agreement between the plaintiffs and the defendant, whereby Kain & Morgan covenanted to furnish, in blocks prepared for cutting, all the marble required to fulfill the plaintiffs' contract, and the plaintiffs agreed to pay them a certain sum therefor, out of the sum agreed to be paid by the defendants, and in similar installments, but expressly stipulated that the said Kain & Morgan should not look to the plaintiffs, except to the funds as supplied by the defendants. The circuit judge instructed the jury that the plaintiffs were entitled to recover the profits which would have accrued to them from the actual performance of the contract, and that, as the rough marble was to be procured from Kain & Morgan's quarry, the contract was to be deemed a part of the performance of the plaintiffs' contract, and the plaintiffs were entitled to recover from the defendants the damages for which they would be liable to Kain & Morgan on that contract. There was a verdict for the plaintiffs for a large amount, greatly exceeding the loss of the marble actually on hand. The defendants appealed. It is obvious that the ground of complaint here was not the failure to pay for the marble already cut and delivered, but the ground of complaint, and the breach alleged, were that the defendants refused to receive or pay for any more marble, want of funds being alleged as the cause. The only item of damage in which the failure on the part of the defendants to pay money cuts any figure was the damage growing out of the contract with Kain & Morgan, with whom plaintiffs had contracted, and whom they were to pay in installments similar to the installments due the plaintiffs from the defendants; but the circuit court was reversed in the court of appeals for having allowed this damage to be computed in the verdict, Chief Justice Nelson saying, "I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract." So this may be laid out of the case altogether. Said the chief justice: "The damages for the marble on hand, ready to be delivered, was not a matter in dispute on the argument. * * * The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform, in all things, on their part, and the case assumes that they were possessed of sufficient means and ability to have done so." Not that the means and ability were to be obtained from the defendants in the form of the payment of the installments as the work became due, as provided in the contract, but that the plaintiffs were possessed of sufficient means and ability, independent of what they were to receive from the defendants, to perform all things on their part to be performed, had they been permitted to do so, but they were not allowed to perform the contract, the defendants refusing to receive or pay for any more marble; but it was that refusal alleged and proved which constituted the breach for which the plaintiffs were in that case permitted to recover. So far from being an authority for the plaintiffs, it seems to us that it can be relied upon to establish the contrary doctrine.

The case of McElwee v. Improvement Co., reported in 4 C. C. A. 525, 54 Fed. 627, is, upon its face, a mere dictum upon the point under consideration. In that case a land company, in order to procure the erection of a mill near its land, contracted to pay a bonus to the manufacturer,—a fixed sum to be paid when the latter was ready to begin work thereon, and the rest in installments as the work progressed. The first installment was promptly paid, but two others were earned, and not paid, whereupon the manufacturer ceased work, and sued for damages for breach of contract. It appeared that his entire outlay and expenses were less than the first installment received, and there was no proof of loss or profits. Held, that he could recover nothing. The proposition upon which the plaintiff in error relies here is stated hypothetically by the court in that case, was not necessary to a decision of the case, and is a mere obiter dictum.

Kendall Bank-Note Co. v. Commissioners of the Sinking Fund, 79 Va. 563, was a case where, after having entered into a contract with the defendants in error, the plaintiffs in error, without any sufficient cause, revoked the contract which it had made. Thereupon the Kendall Bank-Note Company sued in the circuit court of the city of Richmond, obtained a judgment for a large sum, and the commissioners of the sinking fund brought it, upon a writ of error, to this court. Judge Lacy, in delivering the opinion, at page 573, says, "The plaintiffs can recover for prospective profits when they are prevented from going on by being ordered to desist from the work, or by the omission to perform some condition precedent to its further prosecution by the other party." The board of sinking fund commissioners had canceled the contract, and forbidden the Kendall Bank-Note Company to proceed further in the execution of it. Clearly, therefore, the bank-note company had a right to recover for whatever profits would reasonably accrue upon their contract. There is not one word said in that case about the failure to pay money, as constituting the cause of action, or that the mere failure to pay money would in any case entitle the plaintiff to recover any damages in addition to the principal sum, with lawful interest thereon. It is conceded, however, that there are such cases. A familiar example of such a case is that a banker is liable to damages for the refusal to pay a check. Marzetti v. Williams, 1 Barn. & Adol. 415. See, also, Tuers v. Tuers, 100 N. Y. 196, 2 N. E. 922.

Many instances of a like character might be given, but we have seen no case which will sustain the instruction under consideration. It is the ordinary case of a failure to comply with a contract to pay money at a stipulated time. In such cases the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiff by the use of the money in addition to the interest would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiff can bring his case within some well-recognized exception to the rule.

For the foregoing reasons, we are of opinion that the circuit court did not err in setting aside the verdict and granting a new trial. We are also of opinion that there was no error in the judgment rendered by the court, which is fully supported by the facts shown in evidence, and it is affirmed.

LOWE v. TURPIE et al.[1]

(44 N. E. 25, 147 Ind. 652.)

Supreme Court of Indiana. May 15, 1896.

Appeal from circuit court, Cass county; J. S. Frazer, Special Judge.

Action by James H. Turpie and others against Hugh Lowe for breach of contract. From the judgment rendered, defendant appeals. Reversed.

Edwin P. Hammond, Charles B. Stuart, William V. Stuart, S. P. Thompson, and R. P. Davidson, for appellant. Walker & McClintic, J. H. Gould, and Elliott & Elliott, for appellees.

MONKS, J. On February 18, 1886, appellees James H. and William Turpie commenced an action against appellant in the White circuit court. The complaint was in three paragraphs, to each of which the court sustained a demurrer for want of facts. Judgment was thereupon rendered in favor of this appellant, which on appeal in this court was reversed, and the court below directed to overrule the demurrer to the complaint. Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834. After the return of said cause to the court below the demurrer was overruled as directed. About the time of the commencement of said action by the Turpies in the White circuit court, in February, 1886, two other actions were commenced in the said court against appellant, growing out of the same alleged transactions set up in the action of the Turpies,—one by appellee Cornelius M. Horner, and one by appellees Emma J. and Mary F. Turpie, wives of the said James H. and William Turpie. These three suits were pending in 1889, and were sent, on change of venue, to the Cass circuit court. In January, 1890, by agreement, the three causes were consolidated, and the court ordered that George T. Jones and others be made parties defendant. Afterwards, in April, 1890, James H. and William Turpie filed an amended complaint, in five paragraphs. The second paragraph was stricken out on motion. Appellant demurred to each of the remaining paragraphs of the complaint, for want of facts, which demurrer was overruled. To this complaint appellant filed an answer. Appellees Emma J. and Mary F. Turpie in July, 1890, filed their amended complaint, asking damages against appellant, which he answered by general denial. George T. Jones also filed a counterclaim asking judgment against appellant, on which issue was joined. The cause was submitted to the court, and at request of appellant a special finding was made, and conclusions of law stated thereon against appellant, to each of which he at the time saved an exception. Upon the findings and conclusions of law, the court on February 5, 1891, rendered judgment against appellant, in favor of James H. and William Turpie, for $19,775; in favor of appellees Emma J. and Mary F. Turpie, in the sum of $10,000; in favor of appellee Horner, in the sum of $3,297; and in favor of appellee Jones, in the sum of $890. From these judgments, appellant appealed to this court, and perfected a term-time appeal, under section 638, Rev. St. 1881 (section 650, Rev. St. 1894). Afterwards, in November, 1891, by leave of court, appellant entered upon the transcript an amended assignment of errors, adding the names of additional persons as appellees, after which a joinder in error was endorsed upon the record, and signed by attorneys for appellees. This, under rule 8 of this court (27 N. E. iv.), was an appearance, and no notice to appellees was required. See Elliott, App. Proc. §§ 404-406.

But it is claimed by appellees that by the additional transcript filed May 21, 1892, attempting to bring up certain reserved questions of law, an appeal was attempted to be taken under section 630, Rev. St. 1881 (section 642, Rev. St. 1894), and this was an abandonment of the first appeal. The transcript filed May 21, 1892, consisted of a bill of exceptions purporting to contain a part of the evidence given in the cause, and matter supposed to be necessary to present certain reserved questions of law, and was brought into this court, as a part of the record, by a writ of certiorari issued in said cause on application of appellant. It is not, therefore, a separate or independent appeal, but a part of the record in this cause, and is not an abandonment of the term-time appeal. Whether that part of the record so brought into this court presents any question, or whether an appeal may be taken under both of said sections of the Code, we need not, and do not, determine.

It is claimed by appellant that the court erred in overruling the demurrer to the first, third, and fourth paragraphs of the amended complaint of James H. and William Turpie. This court held on the former appeal (Turpie v. Lowe, 114 Ind. 56-60, 15 N. E. 834) that the part of the complaint which alleged a sale and conveyance to appellant of real estate in Ohio, and a promise to pay the purchase money, stated a good cause of action. An amended complaint has since been filed, but the allegations concerning the sale of the Ohio real estate are substantially the same in each paragraph of the amended complaint as in the third paragraph of the original complaint. There was therefore no error in overruling the demurrer to each paragraph of the amended complaint of James H. and William Turpie.

Many questions concerning the sufficiency of the different pleadings, and the admissibility of evidence, are discussed by counsel; but, as the controlling questions are also presented by the exceptions to the conclusions of law, we will consider them in that connection. The special finding of facts, and the conclusions of law stated thereon, so far as necessary to the determination of this cause, are as follows:

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[1] Rehearing denied.

Appellees James H. and William Turpie were on December 3, 1885, and still are, partners in business as traders in real estate, and were, as such partners, the owners, as tenants in common, of real estate in the counties of White, Jasper, and Starke, in Indiana, and in the counties of Franklin, Union, and Delaware, in the state of Ohio, all of which is described in the finding, and the value of each tract stated. A part of said real estate was held by said Turpies in fee simple. As to a part, they held the equitable title, under contracts of purchase. Part of said real estate was held in the names of others, as trustees for the Turpies. On said day there were existing and valid judgments against the Turpies, in favor of divers persons, rendered by the White circuit court, the Carroll circuit court, of Indiana, and other courts in said state, taxes due and unpaid, ditch assessments, and mortgages, amounting in the aggregate to about $15,000. That on or before December 3, 1885, the Turpies owned in fee simple the undivided four-fifths of a farm of 324 acres in Delaware county, Ohio, known as the Starke or Wagner farm, which farm was of the value of $17,820. That the other one-fifth of said farm was owned by George T. Jones, one of the appellees. That there were two mortgages on said farm,—one in favor of the Michigan Mutual Insurance Company, upon 283 acres of said farm, for $10,000, and one upon the remaining 41 acres of said farm, to one Starke, which, with accrued interest, amounted at said date to about $1,160. That on the same day appellant was the owner in fee of two one-acre lots in J. C. Reynolds' Third addition to the town of Monticello, Ind., equivalent in size to 10 ordinary town lots, and was also the owner in fee of the N. E. ¼ of the N. W. ¼ of section 16, township 28 N., of range 4 W., in said county, known as the "Nutter Forty Acres," which said lots in Monticello were worth $500, and which said 40-acre tract was worth $600. That said Turpies were financially embarrassed, and wholly unable to raise the money to meet their matured and maturing liabilities. That the property held by them as aforesaid was of great value, but so heavily incumbered by liens, some of which were overdue, and others soon to mature, that all said property was in great danger of being sacrificed for less than its real value. And said appellant was a man of large financial ability and credit, and the owner of a large amount of unincumbered real estate and personal property. That he had a large amount of ready money and other assets, and was abundantly able to fulfill the contract hereinafter named. That on said 3d day of December, 1885, said Turpies, in the name of said William Turpie, entered into an agreement with said appellant, in writing, respecting the said Starke farm, as follows:

"December 3rd, 1885. This is to certify that William Turpie, of the first part, and Hugh Lowe, of the second part, have this day made a trade for a farm in Delaware county, in the state of Ohio, known as the 'James Starke Farm,' on Starke's Corners; the undivided one-half (½) of said three hundred and twenty-four (324) acres to belong to Hugh Lowe, the other one-half (½) to belong to William Turpie. Hugh Lowe is to assume the one-half (½), twelve thousand three hundred ($12,300) dollars, and William Turpie the other one-half (½). Hugh Lowe to have deed for the whole 324 acres for the present time. The following described property and stock on said farm is to be held jointly: Seven head of horses; 1 mule; 29 head of cattle shipped from White county, Indiana; 4 cows; 1 heifer; 2 buggies that were already on farm; 13 head of cattle bought of Dan Hunt; 110 sheep; all harness and farm implements on farm; buggies and wagons; all wheat in the ground on the farm; and all grain, hay, or feed on the farm; and (1) one lot on corner of Woodruff and High streets. Lowe is to have one-half (½) interest in said lots, and the balance of the G. A. Wagner lumber is to be divided equally by Lowe paying freight to Columbus, Ohio. Turpie is to make one hundred ($100.00) dollars up in trade to Lowe. Wm. Turpie. Hugh Lowe."

"December 3rd, 1885. This is to certify that Hugh Lowe, of the first part, deeds, or causes to be deeded, to William Turpie, at his option, the following described property: 10 lots in J. C. Reynolds' addition to the town of Monticello, Indiana; 40 acres, more or less, known as the 'Nutter Land,' near the town of Monon, in White county, Indiana. Wm. Turpie. Hugh Lowe."

He afterwards further agreed by parol, with the consent of said Turpies, in consideration of said Jones and wife joining in said deed for said farm, that said appellant would convey to said Jones the undivided one-half (½) of said lots in Reynolds' addition to Monticello, and the undivided one-half (½) of said Nutter 40 acres, and in consideration thereof said Jones and wife joined in the execution of said deed. It was further agreed by parol between said appellant and said Turpies that said appellant would pay off all the incumbrances upon said farm, and it was so stipulated in said deed, all of said incumbrances, over the sum of $6,150, to be repaid to him by the Turpies, and until the same was repaid he was to hold the title of the whole of said Starke farm as security therefor. That in order to balance accounts respecting the live stock and personal property upon said farm, and some payments made at the time by said appellant for said Turpies, the said William Turpie executed on the 3d day of December, 1885, a promissory note to said appellant for $580.91. That afterwards, in said month of December, the Turpies entered into a series of agreements with appellant, in which it was, in substance, provided that appellant should pay all the liens and incumbrances on the real estate of the Turpies in Indiana; and it was also agreed with the Turpies and Horner to pay said Horner the amount of the Turpies' indebtedness to him,—about $1,335,—and to pay the John H. Miller note, upon which Horner was surety, amounting to about $1,000. In consideration of which the Turpies were to execute to appellant their note for their indebtedness to him, except the note of $580.91, and from time to time, as the Turpies' outstanding obligations should be paid by appellant, to execute to him other notes for amounts so paid, all to bear interest at 8 per cent. per annum; and to secure the amount they then owed appellant, and the advances so to be made by him, they were to convey, or cause to be conveyed, to him, their real estate in Indiana, including the four lots in Monon held in the name of Horner, and the undivided one-half of the Ohio real estate, except nine lots in R. P. Woodruff Agricultural College addition to Columbus, Ohio, which they reserved for their wives. The Turpies, in consideration of the sum of $20,000 to be paid by appellant upon liens and incumbrances then upon the Ohio real estate, sold to appellant the other undivided one-half of said Ohio real estate, which they were to convey, or cause to be conveyed, to him, in fee simple, except that said nine lots reserved for the Turpies' wives were to be conveyed by one Woodruff, who held the legal title thereto, to appellant, and he was to reconvey the same to the Turpies' wives free from all incumbrances. That, when the conveyance should be made to appellant for said Ohio property so sold to him, the undivided one-half thereof should be included in the conveyance, but to be held by appellant as security to him for the payment of said Indiana debts, and security for any amount in excess of said $20,000 which appellant might pay to relieve said Ohio real estate from incumbrances; all of which incumbrances on the Ohio real estate appellant, in pursuance of the agreement, was to pay. The Turpies conveyed, or caused to be conveyed, all of said Ohio real estate, except a tract known as the "Mt. Vernon Hotel Property." That the full consideration was paid by the Turpies and their wives for the conveyance by appellant to the Turpies' wives of said nine lots, and that said lots were of the value of $10,000. That the Turpies' wives took immediate possession about January 1, 1886, of said nine lots, with appellant's consent, under his agreement to convey the same to them. That in December, 1885, the Turpies conveyed, and caused to be conveyed, to appellant, all the said real estate in the counties of Jasper, Starke, and White, in Indiana, except four lots in Monon held by them in the name of Horner; and on December 10, 1885, said Horner and wife executed a deed to appellant for said Monon lots held in Horner's name as security for the Turpies' indebtedness to Horner, and to indemnify him from loss as their surety, who accepted said deed, and promised Horner that he would pay said Miller note. That on December 7, 1885, the Turpies and appellant executed the following agreement in writing: "Monon, Indiana, December 7th, 1885. This memorandum is to show that all real estate in Indiana and Ohio that James H. Turpie and William Turpie and wives have conveyed to me, Hugh Lowe, in the year 1885, is to be held in trust for them, and to be held by said Lowe as security for all claims coming to him from said Turpies, which is evidenced by promissory notes; and, when said claims are paid by said Turpies, said Lowe is to convey to the Turpies, or any one they suggest, except one-half (½) interest in the Wagner farm, in Ohio, which is explained by another contract. [Signed] Hugh Lowe. James Turpie. William Turpie." That about the 1st day of March, 1886, said Lowe took exclusive possession of all live stock and personal property on said Starke farm belonging to himself and said plaintiffs, and converted the same to his own use. The same was of the value of $4,000. That, soon after the deeds for all the property aforesaid were delivered to said appellant, he, without cause, refused to carry out or further perform his contracts aforesaid; and he refused to pay any more of the debts, liens, or incumbrances on any of said property, and has failed to pay his said note given to Horner, or said Miller note, which last note Horner has been compelled to pay, to wit, $975, on the 18th of February, 1886. That, when said appellant refused, he was financially able to complete and perform the same. That said Turpies had placed in his hands all their property and means that could in any way be used to pay said debts, and were therefore wholly unable to pay or discharge the same, or any part thereof, all of which was well known to appellant when he received the same, and when he made, and also when he refused to perform, the said contracts. That, before the commencement of this suit by the said Turpies, they made demand of appellant that he perform, all and singular, the said several contracts, and each specification thereof; and said appellant refused, and has ever since refused and neglected, to perform the same, or any part thereof, except as herein stated. That before the commencement of this suit the said Emma J. Turpie and Mary F. Turpie, by their agent, James H. Turpie, demanded from appellant the conveyance to them of said lots Nos. 244 to 252, inclusive, in Woodruff's Agricultural College addition to the city of Columbus, Ohio, free of incumbrances, as specified in the agreement aforesaid made with appellant by said James and William Turpie; and said appellant refused to make such conveyance, and has ever since neglected and refused to perform said contract, but, in violation of his agreement aforesaid to pay incumbrances thereon, has permitted the same to be sold to pay the incumbrances that he agreed to remove therefrom, and the title to said lots has passed to innocent purchasers at sheriff's sale. That, before the commencement of any proceedings against or in favor of said defendant George T. Jones, he demanded of said appellant the performance of his contract to convey to him the undivided one-half of said two acres, equal to ten lots, in Reynolds' addition to Monticello, Ind., and to convey to him the undivided one-half of the land described herein as the "Nutter Forty Acres"; and said appellant has refused and wholly failed to make such conveyance, or in any way to make compensation to said Jones for the execution by him and wife of the deed of the Starke farm, in Delaware county, Ohio, executed on the 22d day of December, 1885. That Lowe failed to pay, satisfy, or discharge the liens upon the property in Ohio deeded to him as hereinbefore found, except as otherwise stated herein, to wit, $4,185.86. That after the 4th day of January, 1886, the several holders of the liens upon said Ohio property brought suits in the courts of said states having jurisdiction, and obtained decrees and orders of sale for the greater part of said property in said Franklin and Union counties, and the same was sold upon execution, and at judicial sale, to satisfy the liens thereon which said appellant had agreed to pay, and thereupon the legal title to all of said real estate in Ohio so sold was lost to the plaintiffs. That the real estate in the state of Ohio conveyed to appellant, and held by him as security as aforesaid, to wit, the undivided one-half of all the real estate in Ohio hereinbefore described (except the certain specified tracts), sold at judicial sales, was so sacrificed and consumed by costs and expenses that it paid only the sum of $22,756.56 of the debts of said Turpies which said Lowe had agreed to pay. That on the 3d of December, 1885, the 283 acres of the Starke farm, in Delaware county, Ohio, under mortgage to the Michigan Mutual Insurance Company, was of the value of $15,565, and that since that time, by reason of the failure of said Lowe to pay said incumbrance remaining unpaid after the 22d day of December, 1885, to wit, $10,300, the whole of said 283 acres has since been sold on a decree of foreclosure to satisfy said mortgage, whereby the title to said real estate has been wholly lost to said Turpies. That the Turpies are indebted to said appellant, on notes held by him, and for moneys paid by him for their use in pursuance of said contracts, and on account, in the sum of $14,332.75, which is a proper set-off against any amount due said plaintiffs from him. That prior to the commencement of this suit said Turpies offered to deliver to the defendant Lowe a deed, duly signed and acknowledged by their wives and themselves, conveying the real estate in Knox county, Ohio, known as the "Mount Vernon Hotel Property," to him, and demanded of him, then and there, to carry out and perform his several contracts. That the rental value of certain lands of the Turpies in White county, of which appellant had possession, was $1,120. That appellant received $35, the proceeds of the sale of one horse, the property of the Turpies. That by reason of the failure of said appellant to perform his said agreements, and the sale of said real estate by virtue of judicial process resulting in consequence thereof, there was large loss and damage to said James H. and William Turpie; that is to say, their real estate, of the value of $32,695, satisfied only $13,765.07 of their indebtedness. But the same sales of said Lowe's undivided one-half of some of the same real estate, and of the nine lots to be conveyed to the wives of said Turpies, realized a sum, which was applied in payment of said debts, enough to make up the loss, except the sum of $6,008.70. That the value of said one-fifth of said Starke farm, conveyed by said Jones and wife to Lowe, subject to the incumbrance thereon, was at the time of said conveyance, December 22, 1885, $800. That the value of attorney's services in the collection of said note from Lowe to Horner, described in said Horner's complaint, is $300.

"And the court now states its conclusions of law upon the foregoing facts to be as follows: (1) * * * (2) That said Horner is entitled to recover from said Lowe, upon said promissory note given by him to Horner, the sum of two thousand and thirty-three ($2,033) dollars, and, on account of the failure of said Lowe to pay said Miller note, the sum of twelve hundred and sixty-four ($1,264) dollars. (3) That said James H. Turpie and William Turpie are entitled to recover from the said Lowe the sum of nineteen thousand seven hundred and seventy-five ($19,775) dollars, which is due to them after deducting all set-offs. (4) That said Mary F. Turpie and Emma J. Turpie are entitled to recover from said appellant the sum of ten thousand ($10,000) dollars. (5) * * * (6) That said Lowe be required to convey to said James H. and William Turpie the undivided one-half (½) of the northeast quarter (¼) of the northwest quarter (¼) of section sixteen (16), township twenty-eight (28) north, range four (4) west, and the undivided one-half (½) of the two (2) one-acre lots in J. C. Reynolds' addition to Monticello, in said county of White, owned by Lowe on the 3d day of December, 1885, and also the whole of the Bradford and Braxton lands, and also said lands in Starke county and in Jasper county, Indiana, conveyed to said appellant, and also said lots in Monon, in finding numbered 60 specified, by proper deeds of release and quitclaim. (7) That said Jones is entitled to a judgment against said Lowe for the sum of $800."

The correctness of each of the conclusions of law is called in question by the assignment of errors. It is earnestly insisted by appellant that the facts do not sustain the third conclusion of law,—that the Turpies are entitled to recover from appellant $19,775. The correctness of this conclusion of law depends upon what is the proper measure of damages under the facts set forth in the special finding. On the former appeal of this cause (Turpie v. Lowe, supra), the deeds conveying to appellant the Indiana and Ohio real estate to secure an existing indebtedness, and future advances to pay liens set out in the special finding, were held to be mortgages. In that case the Turpies claimed that they were entitled to recover either the full amount which the appellant, Lowe, agreed to advance as a loan in the way of discharging liens and debts, or the value of the lands conveyed by the deeds. In response to such contention the court, on pages 53, 54, 114 Ind., and page 834, 15 N. E., said: "If we are correct in our construction of the contract set up in the complaint, Lowe's agreement to pay liens, etc., was nothing more than a contract to advance money for the benefit of appellant [the Turpies], and is the same, in effect, as if he had agreed to advance money direct to them as a loan. Whatever damages, therefore, they might recover from Lowe for the refusal to make such a direct loan after having taken security for the same, they may recover here nothing more." The covenant in a deed absolute on its face, but intended as a mortgage, or a parol contract made at the time of the execution of the deed, whereby the grantee agrees to pay a debt of the grantor due another person, cannot be enforced by such person against the grantee. Such an agreement is nothing more, in effect, than an agreement to advance the amount of the debt or incumbrance as a loan upon the security of the land conveyed. Root v. Wright, 84 N. Y. 72; Garnsey v. Rogers, 47 N. Y. 233; Pardee v. Treat, 82 N. Y. 385. It is clear, we think, that the measure of damages for the breach by appellant of his agreement to advance money to pay liens, etc., set forth in the finding, is the same as for breach of a contract to loan money direct. This court also held in that case that the complaint, so far as it rested upon the agreement of this appellant to advance money, and the deeds to secure the same, only made a case for nominal damages, as no special damages were shown. When the case was returned to the court below, the Turpies filed their amended and supplemental complaint, in five paragraphs, as heretofore stated, in which they declared upon the same oral contracts, and also, for the first time, brought in the written agreements set out in the special findings, they not having been mentioned in the original complaint. In the amended complaint which was filed in April, 1890, it was alleged that the several holders of the liens on said real estate, to pay which appellant had agreed to advance money, brought suit in the courts having jurisdiction, and procured decrees and orders of sale, upon which said real estate was in the year 1887, and the latter part of the year 1886, sold at sheriff's sale, and the money received applied on said liens, and sought thereby to recover, as special damages, the difference between the value of said real estate and the amount for which the same sold at sheriff's sale. It is evident from the special finding, and the conclusions of law stated thereon, that the trial court adopted this measure of damages. It is the rule, settled beyond controversy, that the damages to be recovered must be the natural and proximate consequences of the breach of the contract. Damages which are remote or speculative cannot be recovered. Fuller v. Curtis, 100 Ind. 239; Cline v. Myers, 64 Ind. 304; Loker v. Damon, 17 Pick. 284; Prosser v. Jones, 41 Iowa, 674; Wire v. Foster, 62 Iowa, 114, 17 N. W. 174; Osborne v. Poket, 33 Minn. 10, 21 N. W. 752. Hadley v. Baxendale, 9 Exch. 341,—the leading English case, and one followed by the courts of this country,—lays down the following rule concerning the measure of damages: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally (i. e. according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach." When one is indebted to another, and fails to pay the same when due, the damages for the delay in payment are provided for in the allowance of interest. This is the measure of damages adopted by the law in all actions by the creditor against his debtor. Loudon v. Taxing Dist., 104 U. S. 771; Insurance Co. v. Piaggo, 16 Wall. 378; Greene v. Goddard, 9 Metc. (Mass.) 212, 232; 5 Am. & Eng. Enc. Law, p. 27, and note 2, p. 25.

Appellees admit the measure of damages for the failure of a debtor to pay money when due to be as stated, but insist that where the obligation to pay money is special, and has reference to other objects than the mere discharge of debts,—as in this case, to advance or loan money to pay taxes and discharge liens,—damages beyond interest for delay of payment, according to the actual injury, may be recovered; citing 1 Suth. Dam. p. 164, § 77, where the rule stated by appellees is approved. The author, however, in the same section, says: "Where one person furnishes money to discharge an incumbrance upon the land of the person furnishing the money, and the person undertaking to discharge it neglects to do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished, with interest, or the value of the land, according to circumstances. If the landowner has knowledge of the agent's failure in time to redeem the land himself, the damages will be the money furnished, with interest. But if the landowner justly relies upon his agent to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost." See Fontaine v. Lumber Co. (Mo. Sup.) 18 S. W. 1147. In Blood v. Wilkins, 43 Iowa, 565, Blood was the owner of certain land in Jones county, and conveyed the same to Wilkins as security for money advanced and to be advanced by Wilkins, and applied in payment of certain mortgages and tax liens upon the property. Part of the money was paid out directly by Wilkins in discharge of liens, and a part was retained by him. At the time of the loan the land had been sold for taxes, but the period for redemption had not yet expired. The amount borrowed was enough to discharge all liens, and to redeem from said sales. Wilkins, after the execution of said deed given as security, retained in his hands the money necessary to redeem, under an agreement with Blood that he would redeem. Wilkins failed to redeem, and tax titles accrued against the land, whereby it was lost to Blood, except 40 acres. The court, in speaking of the measure of damages, said: "There only remains to be considered what is the measure of liability. When one person furnishes the money to another to discharge an incumbrance from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished, with interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished, with interest. But if the landowner justly relies upon his agent, to whom he has furnished money to discharge the incumbrances, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land lost." This language was adopted by the author of Sutherland on Damages, in stating the rule. See 1 Suth. Dam. p. 164, § 77. The cases of Bank v. Cook, 49 Law T. (N. S.) 674, and Manahan v. Smith, 19 Ohio St. 384, cited by appellees, are not in conflict with Blood v. Wilkins, supra, but support the rule therein adopted. In the case of Bank v. Cook, supra, the bank made an agreement to loan Cook a large sum of money to purchase a vendor's lien upon the real estate of a corporation, and a number of shares in said corporation. Cook relied upon the bank to provide the money, and did not make, or attempt to make, arrangements with any other person or company to provide the money. The bank did not provide the money, and Cook was not informed that it would not do so until too late to procure the money elsewhere before the time expired within which it was necessary to complete the purchase. The court held that in case of breach of contracts to lend money the damages usually given were merely nominal, for the reason that, usually, if a man could not get money in one quarter he could in another, but that as Cook had, by the conduct of the bank in failing to inform him at the proper time that it would not provide the money, been deprived of the opportunity of getting it elsewhere, he was entitled to recover more than nominal damages. In Manahan v. Smith, supra, Breckinridge conveyed to Manahan real estate in Indiana for real estate in Ohio. Soon after the deeds were executed, Manahan learned that an attachment had been previously levied on the real estate in Indiana at the suit of Breckinridge's creditors, whereupon Breckinridge, with Smith as guarantor, agreed in writing to cancel within six months the incumbrances on the Indiana land, but failed to do so; and the Indiana land was sold by order of court in 1856, without notice to Manahan, who resided in Ohio, and did not hear of the same till several months thereafter. In an action against Smith, guarantor of the agreement of Breckinridge to cancel the incumbrance within six months, the court held that the measure of damages, under the circumstances, was the value of the land at the time title thereto was lost, and interest thereon until judgment. It will be observed that this was not a contract to loan money, but a contract on the part of Breckinridge to pay his own debt. The right to recover the value of the land lost was put upon the ground that Breckinridge permitted the land to be sold without giving notice to Manahan and without giving him an opportunity to discharge the incumbrance.

We think the rule concerning the measure of damages in cases where one person furnishes the money to another to discharge liens on the land of the one furnishing the money is correctly stated in Blood v. Wilkins, supra. In an action for breach of a contract to loan money to pay liens or incumbrances, no more than nominal damages can be recovered unless the facts showing special damages are alleged and proven. Turpie v. Lowe, supra. When the person who contracted to make the loan neglects or refuses to do so, and the owner is compelled to procure the money elsewhere, the measure of damages is the difference, if any, between the interest he contracted to pay, and what he was compelled to pay to procure the money; not exceeding, perhaps, the highest rate allowed by law. 2 Sedg. Dam. § 622. It is not necessary to determine whether the measure of damages for breach of a contract to loan money to pay liens in case the land is lost is the same as in a case of the neglect of one to whom money is furnished by the landowner to pay liens or incumbrances, for the reason that, if it were conceded that the measure of damages in this case was the same as it would have been had the Turpies furnished appellant the money to discharge all said debts and incumbrances, yet, under the facts as stated in the special finding, the Turpies would not be entitled to special damages. To entitle any one to recover more than nominal damages for a breach of contract to loan money to pay incumbrances, it is necessary not only to allege and prove the contract to loan the money, and its breach, and that the person who agreed to make the loan knew the purpose for which it was to be used, and the necessity therefor, but also that the land was lost to the owner by reason of such liens or incumbrances, and without his knowledge, and solely through the fault of the person who was to loan the money, or, if the landowner had notice of the neglect or refusal to loan the money, that it was at such a time as to deprive him of the opportunity to procure the money elsewhere, and pay said liens or incumbrances, or redeem the land, if sold. The facts found in the special finding show that appellant had refused to pay any more of said liens or incumbrances, or carry out or further perform his contracts; but they do not show that such knowledge was acquired by the Turpies too late to give them an opportunity to procure from other parties the money, and pay said liens or incumbrances. On the contrary, it appears from the finding of facts that appellant, between January 4, 1886, and February 18, 1886, refused to pay any more of the debts, liens, or incumbrances on any of said property which he had agreed to pay, and refused to carry out or further perform his said contracts, and said he would not further execute the same; that the real estate in Indiana was sold in 1886 and 1887, the statute giving one year from the date of each sale to redeem the real estate. The suits to recover the judgments and decrees upon which the Ohio real estate was sold were not commenced until after January 4, 1886. It is shown, therefore, by the special finding, not that the Turpies did not know of the refusal of appellant to pay said liens and incumbrances in time to give them an opportunity to procure the money, but that they had such knowledge in ample time to give them the opportunity to procure the money and pay said liens and incumbrances, and thus prevent the loss of their land. Under this state of facts, only nominal damages could be allowed the Turpies on account of the loss of the lands held by appellant as mortgagee.

It is insisted by the Turpies that the special finding "that the Turpies had placed in appellant's hands all of their property and means that could in any way be used to pay said debts, and were therefore wholly unable to pay or discharge the same or any part thereof," shows that it was impossible for them to procure the money. In view of the other finding that all the Indiana land, and an undivided one-half of the Ohio land, conveyed by deeds to appellant, were held by him as security for money advanced and to be advanced, the part of the special finding last quoted is a mere conclusion. These conveyances, as to the real estate mentioned, were merely mortgages, and appellant had no title to the land which he could sell or convey. A deed executed to secure a debt is a mortgage, and conveys no title. The mortgagee simply holds the land as security for the payment of the debts. His rights were the same as if the conveyances were mortgages in form. Parker v. Hubble, 75 Ind. 580; Bever v. Bever (Ind. Sup.) 41 N. E. 944, and cases cited; Fletcher v. Holmes, 32 Ind. 497; Smith v. Bland. 64 Ind. 427; Miller v. Curry, 124 Ind. 48, 51, 24 N. E. 219, 374; Turpie v. Lowe, on page 55, 114 Ind., and page 834, 15 N. E.; Chitwood v. Trimble, 2 Baxt. 78.

When, in 1886, prior to February 18th, appellant refused to make further advances, if the Turpies had paid or tendered appellant the amount then due, they could have demanded a cancellation of the mortgages, or a reconveyance; and, if refused, a court of equity would have enforced a compliance with such demand, or, without paying or tendering payment, a court of equity, on application, would have decreed the deeds to be mortgages. The Turpies were the owners of the real estate conveyed as security, after the deeds were made the same as before, and had the right to sell and convey or mortgage the real estate, the same as if the deeds had been in form, as they were in fact, mortgages. In contemplation of law, money is always in the market, and procurable at the lawful rate of interest. And if the owner of real estate, who has a contract with another to loan him money to pay liens or incumbrances on his land, who refuses to do so, has knowledge of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money, on account of being in embarrassed circumstances, will not entitle him to recover more than nominal damages; for the reason that no party's condition, in respect to the measure of damages, is any worse, for having failed in his engagement to a person whose affairs are embarrassed, than if the same result had occurred with one in prosperous or affluent circumstances. City of Delphi v. Lowery, 74 Ind. 520, 527, 528; Hagan's Petition (Morgan v. Bridge Co.) 5 Dill. 96, Fed. Cas. No. 9,802; Mayhew v. Burns, 103 Ind. 328, 338, 342, 2 N. E. 793; 1 Suth. Dam. (2d Ed.) § 76 In Mayhew v. Burns, supra, this court, by Mitchell, J., said: "The law does not set up one standard by which to determine the rights or measure the conduct of the rich, and another for the poor. Its protecting shield is extended alike over all. Its pride and glory are to mete out equal and exact justice to all, in the same scale,—rich and poor alike. In this all find security and protection." It follows, therefore, that upon the facts found the Turpies were not entitled to more than nominal damages for the breach by appellant of his contract to loan money to pay liens and incumbrances. As the Turpies were not entitled to recover for the breach of said contracts to loan money, it is not necessary to determine whether or not the same are void for uncertainty.

It is shown by the special finding that appellant, in consideration of the sale and conveyance to him of the undivided one-half of the Starke farm, was to assume and pay $6,150 of the incumbrance on said farm, and also that in consideration of the sale and conveyance to him of the undivided one-half of the remaining Ohio real estate, with the exception of the nine lots to be conveyed to the Turpies' wives, he has to pay $20,000 on the liens and incumbrances on the Ohio real estate. The law is settled in this state that, for breaches of said agreements to pay said purchase money when due, the Turpies were entitled to sue and recover the amount thereof unpaid, without first having paid said incumbrances, or any of them. Weddle v. Stone, 12 Ind. 625, and cases cited; Johnson v. Britton, 23 Ind. 105; Devol v. McIntosh, Id. 529; Scobey v. Finton, 39 Ind. 275; Mullendore v. Scott, 45 Ind. 115; Turpie v. Lowe, on page 60, 114 Ind., and page 834, 15 N. E. Two hundred and eighty-three acres of the Starke farm were afterwards sold upon a decree of foreclosure to satisfy the mortgage, part of which appellant had assumed. The amount for which the same was sold is not stated with absolute certainty, but it is set forth that the same was sold to satisfy the mortgage thereon, upon which there was due $10,300. Appellant, if charged with said $6,150, was entitled to a credit of one-half of the amount said land paid of said mortgage, in any accounting with the Turpies, for the reason that the sale of his half of said land paid that sum on the mortgage, a part of which he had assumed, as a part of the purchase money therefor. Appellant was to pay $20,000 on liens and incumbrances on the Ohio property. That part of this real estate, the undivided one-half of which was owned by the Turpies subject to the mortgage of appellant, was sold for such sum that, after deducting costs and expenses, the Turpies' one-half of the land paid $22,756.56 of the liens and incumbrances thereon. Whatever amount appellant's half of the land so sold paid, he is entitled to credit for in an accounting with the Turpies, if he is charged with the $20,000, or any part thereof. It should be remembered that the Turpies' wives were entitled to recover that part of the $20,000 which was to have been paid by appellant on the incumbrances on the nine lots he agreed to convey to them. The Turpies therefore were only entitled to charge appellant with the remainder of the $20,000 after deducting that amount. Applying these rules, it is evident that the Turpies were not, upon the facts found, entitled to recover the sum of $19,775. The finding of facts is so ambiguous, uncertain, and defective that the amount which either the Turpies or appellant are entitled to in an accounting one against the other cannot be stated.

It is claimed that the part of the sixth conclusion of law which states that appellant should be required to convey to the Turpies the undivided one-half of the N. E. ¼ of the N. E. ¼ of section 16, township 28 N., range 4 W., and the undivided one-half of the two one-acre lots in J. C. Reynolds' Third addition to Monticello, White county, Ind., depends upon the written contract of December 3, 1885, between the Turpies and appellant, which is set out in the special finding, and provides that appellant shall "deed, or cause to be deeded, to William Turpie, 10 lots in J. C. Reynolds' addition to the town of Monticello, White county, Indiana; 40 acres, more or less, known as the 'Nutter Land,' near the town of Monon, White county, Indiana." There is nothing in the special finding which identifies the real estate described in that part of the sixth conclusion above set out as being the same as that set out in the written contract. It is evident that the description of the lots in Reynolds' addition, both in the written contract and in the sixth conclusion of law, is so indefinite that the same could not be identified or located by a surveyor. Such a description in a deed would not convey title. Gigos v. Cochran, 54 Ind. 593; Shoemaker v. McMonigle, 86 Ind. 421; Armstrong v. Short, 95 Ind. 326, and cases cited; Baker v. Pyatt, 108 Ind. 61, 9 N. E. 112. Besides, the contract provides for the conveyance of 10 lots in J. C. Reynolds' addition, while the sixth conclusion of law requires the conveyance of the undivided one-half of 2 one-acre lots in J. C. Reynolds' Third addition, etc. The lots are not even in the same addition. It is true that it is stated in the finding that the 40 acres described in the sixth conclusion of law are generally known as the "Nutter Forty Acres," but the 40 acres mentioned in the contract are described therein as being known as the "Nutter Land." This does not show that the 40 acres mentioned in the sixth conclusion of law are the same as the 40 acres intended by the contract. It will be observed that the contract provides for the conveyance of all the real estate described therein, while the conclusions of law only require the conveyance of the undivided one-half of the lots, and the 40 acres described in said conclusion of law. If this conclusion was predicated upon the finding that said written contract had been modified upon the parol agreement made between appellant and Jones, with the consent of the Turpies, that the undivided one-half of the real estate, as described in the contract, should be conveyed by appellant to Jones, it would seem that such modification would bring the contract, as modified, within the statute of frauds, and the contract, as modified, could not, therefore, be enforced. Carpenter v. Galloway, 73 Ind. 418; Browne, St. Frauds, §§ 411, 414; Wood, St. Frauds, § 403. It follows that the sixth conclusion of law is erroneous.

It is urged by the appellant that the part of the second conclusion of law which states that Horner is entitled to recover from appellant $1,264 on account of his failure to pay the John H. Miller note is not sustained by the facts found; that the promise was, in effect, only to loan the Turpies the money to pay said note; that, if the facts found show a promise to pay said note, the same was a promise to answer for the debt of another, and, not being in writing, could not be enforced. It is shown by the special finding that John H. Miller held the note of the Turpies, upon which Horner was a surety, for about $1,000; that this was one of the liabilities of the Turpies which appellant had on December 7, 1885, agreed to advance the money, by way of a loan, and pay, and to secure which the Turpies conveyed, or caused to be conveyed, to appellant, real estate in Ohio and Indiana. The language of the special finding concerning the agreement to pay the note is: "Appellant agreed with said Horner and Turpies to pay said Horner the amount due from them to Horner, to wit, thirteen hundred thirty-five dollars, and to pay to John H. Miller a note of said Turpies, upon which said Horner was surety, amounting to about one thousand dollars," etc. That "certain lots in Monon were owned by the Turpies, in the name of Horner, and these lots were a part of the real estate to be conveyed to appellant as security for money advanced and to be advanced by appellant to pay Turpies' debts." That "when appellant received the deed for the Monon lots held in Horner's name as security for Turpies' indebtedness to Horner, and to indemnify him from loss as their surety, he promised said Horner that he would pay said Miller note." This conveyance from Horner to appellant, made in pursuance to the agreement with the Turpies, was the only one executed to appellant by any one for said lots. The money so to be paid by appellant was a loan to the Turpies, as held by this court on the former appeal, to secure which they conveyed, and caused to be conveyed, real estate. The facts found do not show that appellant became the debtor of the Turpies, or the debtor of Horner. He purchased nothing of them, and did not agree to pay his own debt, but the debt of the Turpies and Horner, by promising to pay the Miller note. It was, in effect, a mere contract to advance money by way of a loan to pay said note, and Miller could not have maintained any action thereon against appellant. Root v. Wright, supra; Garnsey v. Rogers, supra; Pardee v. Treat, supra. It is settled law in this state that a contract to answer for the debt of another must not only be in writing, but must be supported by a sufficient consideration. Such a promise may have sufficient consideration to support it, and yet not furnish ground for action, unless reduced to writing. Berkshire v. Young, 45 Ind. 461; Langford v. Freeman, 60 Ind. 46; Krutz v. Stewart, 54 Ind. 178; Hassinger v. Newman, 83 Ind. 124; Stewart v. Jerome, 71 Mich. 201, 38 N. W. 895. The general rule is that the new promise must put an end to the original debt, and extinguish it, or otherwise the new promise will be regarded as collateral, and within the statute. Holderbaugh v. Turpin, 75 Ind. 84, 87; Langford v. Freeman, supra; Crosby v. Jeroloman, 37 Ind. 264; Brant v. Johnson, 46 Kan. 389, 26 Pac. 735; Packer v. Benton, 35 Conn. 343; 95 Am. Dec. 246, and notes 250–263; Gray v. Herman, 75 Wis. 453, 44 N. W. 248; Perkins v. Hershey, 77 Mich. 504, 43 N. W. 1021; Curtis v. Brown, 5 Cush. 488; Fullam v. Adams, 37 Vt. 391. The question to be determined is whether the promise be to answer for the debt of another, or to pay one's own debt. If it be to answer for the debt of another, it is within the statute; but, if it is to pay the promisor's own debt, then it is not within the statute. Upon this principle this court has uniformly held that when one promises to pay his own debt to a third party, to whom his creditor is indebted, or when he purchases property subject to an incumbrance, and, as a part of the purchase money, agrees to pay the incumbrance, he will be liable, and the promise is not within the statute. McDill v. Gunn, 43 Ind. 315; Carter v. Zenblin, 68 Ind. 436; Bateman v. Butler, 124 Ind. 223, 24 N. E. 989. But it is claimed by counsel for Horner "that appellant was liable because, when Horner conveyed the Monon lots, which he held to indemnify him from loss as Turpies' surety to appellant, as shown by the special finding, he agreed with Horner to pay the Miller note, and that this case therefore falls within the rule that the promise to pay the debt of another is not within the statute of frauds if its consideration was the abandonment to the promisor of a security for the payment of the debt, consisting of a lien upon or interest in the property to which the promisor had a subordinate title." We do not think the facts found bring this case within the doctrine as stated, and it is not necessary, therefore, to determine whether the same, expressed in such broad and unlimited terms, is the law of this state. See Langford v. Freeman, supra; Crosby v. Jeroloman, supra; Curtis v. Brown, supra, and cases above cited. It will be observed that appellant's only title, if any he had, to the Monon lots, was that conveyed by Horner. Appellant therefore had no title, subordinate or otherwise, to said lots, before the deed therefor was executed by Horner. Horner, under the facts found, had only a lien, as mortgagee, to indemnify him as the Turpies' surety, and conveyed, if anything, no more than he possessed. If the conveyance by Horner to appellant had the effect to abandon any lien or interest in the Monon lots, yet, appellant having no interest in or title to said lots subordinate to Horner's lien or interest therein, the rule urged would not apply to this case. Besides, Horner was not the creditor. He was one of the makers of the Miller note. To come within the rule, the promise must be made to, and the lien be abandoned by, the creditor, and not by one of the debtors. Luark v. Malone, 34 Ind. 444; Browne, St. Frauds, § 201; Wood, St. Frauds, § 150. The courts, under the claim of acting in the interest of equity and fair dealing, have already gone quite far enough in their effort to take the cases out of the statute requiring a promise to pay the debt of another to be in writing, and we do not think the doctrines which are the result of such efforts should be further extended. That part of the conclusion of law, therefore, that Horner was entitled to recover from appellant $1,264 on account of his failure to pay the Miller note, is not sustained by the facts found. For the same reason the court erred in overruling appellant's demurrer to the second and third paragraphs of Horner's complaint.

It is earnestly insisted by appellant that the facts found do not sustain the fourth conclusion of law,—that Mary F. and Emma J. Turpie are entitled to recover $10,000. The special finding upon this part of the case is of much wider scope than the amended complaint of the Turpies' wives, which contains no averment that they took immediate possession of said nine lots with appellant's consent, under his agreement to convey the same to them, or that said lots had been sold at sheriff's sale to satisfy the incumbrance thereon, and conveyed to innocent purchasers. Neither is it alleged that there was any lien or incumbrance on said real estate. It appears from the special finding that appellant promised to pay all liens and incumbrances on the Ohio real estate; that he was to pay $20,000, in consideration for the conveyance to him of the undivided one-half of a part of said Ohio real estate, upon said liens and incumbrances, and the excess, if any was required, was to be advanced and paid by him as a loan to the Turpies (this included the nine lots to be conveyed to the Turpies' wives, and any liens or incumbrances thereon were to be paid under this agreement); that these lots were conveyed to appellant under the agreement that he would convey them to the Turpies' wives; and that they took immediate possession thereof, with appellant's consent, under his agreement to convey the same to them. It is not directly stated in the special finding that there was any incumbrance on the nine lots. The finding, however, sets out that appellant permitted said lots to be sold to pay the incumbrances that he had agreed to remove therefrom; but the amount of these incumbrances, or when they became due, is not stated. Under the agreement, and the possession taken thereunder by the Turpies' wives, as stated in the special finding, they were the real owners of said nine lots. Appellant had no right of possession or control, except to convey said real estate to the Turpies' wives. His title was a naked or nominal trust. Teague v. Fowler, 56 Ind. 569; Myers v. Jackson, 135 Ind. 136, 34 N. E. 810, and authorities cited. It is stated in the finding that appellant failed to pay the incumbrances on said lots, and permitted the same to be sold to pay the incumbrances that he agreed to remove therefrom, and that the title thereto had passed to innocent purchasers at sheriff's sale. It is not, however, found what part of said $20,000 was to have been paid on the incumbrances on the nine lots, nor that such part would have satisfied the incumbrances thereon. The Turpies' wives knew before February 18, 1886, when they commenced their action against appellant, that he had refused to comply with his contract and pay any more of the $20,000 on incumbrances. The loss by the Turpies' wives of the nine lots by sheriff's sale, as shown, was caused by the incumbrances not being paid, and not by the refusal of appellant to convey the same to them. The fact that appellant refused to pay the said incumbrances,—of which they had knowledge,—and permitted the lots to be sold to pay the same, as stated in the finding, did not give the Turpies' wives the right to recover of appellant the value of said lots, but only the amount he was to have paid thereon. The rule concerning the measure of damages is the same as if appellant had conveyed the lots to them when they took possession, or the same had not been conveyed by Woodruff to appellant, but had been conveyed directly to them. They were the real owners of the nine lots, and could have paid off the incumbrances thereon, thus protecting their title, and, when the same became due, recovered from appellant whatever part of the $20,000 was to have been paid thereon under the agreement, or, whenever said incumbrances became due without paying the same, the had a right to recover against appellant for whatever part of said $20,000 was to have been paid thereon. Turpie v. Lowe, on page 60, 114 Ind., and page 834, 15 N. E., and cases cited. The finding upon which the right of the Turpies' wives to recover is predicated is very ambiguous, indefinite, and uncertain, and contains many conclusions. There is nothing in the finding showing how it was possible for the nine lots to be sold and conveyed by the sheriff to innocent purchasers. They, as shown by the finding, were in possession of said lots, and were necessary parties to any action to enforce any incumbrance thereon. Their possession was notice of their title. Under such circumstances, that part of the finding which sets out that the title of said lots had passed into the hands of innocent purchasers states only a conclusion. The facts, if any, from which such conclusion was drawn, should have been stated. For all that appears, the Turpies' wives are still in possession of said real estate. They could not be deprived of their title unless made parties to the proceeding under which the same was sold. There is nothing set forth in the special finding which would entitle them, under the rule stated concerning the measure of damages, to recover from appellant the value of said lots. It follows that, under the facts found, the only amount which the Turpies' wives were entitled to recover was such part of the $20,000 as was to have been paid on the incumbrances on said lots, with interest from the time the same became due. This sum not being shown by the special finding, there is nothing upon which a conclusion of law showing the amount they are entitled to recover can be stated.

The seventh conclusion of law—that Jones is entitled to recover $800 from appellant—is based upon the theory that Jones, by his counterclaim, sought to recover the value of the undivided one-fifth of the Starke farm conveyed by him to appellant. Appellant urges that the conclusion of law is erroneous because the counterclaim of Jones, upon which the finding in his favor and the seventh conclusion of law rest, does not state facts sufficient to constitute a cause of action, and for the further reason that the counterclaim seeks to recover damages for the breach by appellant of a contract to convey real estate to Jones, and not upon the quantum valebat for the real estate conveyed by Jones to appellant. It is alleged in the counterclaim of Jones that he sold and conveyed the undivided one-fifth of the Starke farm, containing about 324 acres, in consideration of which appellant agreed "to convey or cause to be conveyed to him the undivided one-half of ten lots in Reynolds' addition to Monticello, White county, Indiana, which appellant represented to be worth two hundred dollars each, and the undivided one-half of forty acres of land near Monon, Indiana, by him represented to be worth one thousand dollars; that he relied upon the representat'ons of value, and believed he was contracting for property of the value of fifteen hundred dollars." The counterclaim proceeds upon the theory that Jones was entitled to recover damages for a breach by appellant of the contract to convey the undivided one-half of the 10 lots, and the undivided one-half of the 40 acres of land near Monon, Ind., and that the measure of damages was the value of the real estate appellant had agreed to convey. The agreement of appellant to convey said real estate is not alleged to be in writing, and will therefore be presumed to have been by parol. Wolke v. Fleming, 103 Ind. 105, 106, 2 N. E. 325; Jarboe v. Severin, 85 Ind. 496, 498; Budd v. Kraus, 79 Ind. 137. As the agreement was for the conveyance of real estate of which Jones was not put in possession, the same was within the statute of frauds, and was incapable of being enforced, or of supporting an action for damages for its breach by appellant. Schoonover v. Vachon, 121 Ind. 3, 22 N. E. 777; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345; Burns v. Fox, 113 Ind. 205, 14 N. E. 541; Wallace v. Long, 105 Ind. 522, 5 N. E. 666. Jones' action being to recover damages for the nonperformance of the contract, the counterclaim did not state facts sufficient to constitute a cause of action, and there is nothing, therefore, for the seventh conclusion of law to rest upon. Besides, the special finding shows that the right of Jones to recover was predicated upon the theory that the action was to recover the value of one-fifth of the Starke farm. So that, even if the facts alleged in the counterclaim constituted a cause of action, the conclusions of law would be erroneous, because the same rest upon a different theory from the one set forth in the counterclaim. Judy v. Gilbert, 77 Ind. 96; Mescall v. Tully, 91 Ind. 96; Trentman v. Neff, 124 Ind. 503, 24 N. E. 895. For the reasons given the cause is reversed, with instructions to the court below to sustain appellant's motion for a venire de novo.

WHITE et al. v. MILLER et al.

(78 N. Y. 393.)

Court of Appeals of New York. 1879.

Action by Lewis White and others against Chauncy Miller and others for damages for breach of warranty of goods sold. From a judgment of the general term affirming a judgment for plaintiffs, defendants appeal. Judgment of general term reversed, and that entered on the verdict modified.

R. W. Peckham, for appellants. Esek Cowen, for respondents.

EARL, J. This is an action to recover damages for a breach of warranty in the sale of cabbage seeds. The warranty, as alleged and found, is that the seeds were Bristol cabbage seeds; and it was found that they were not, and that they did not produce Bristol cabbages. The rule of damages, as laid down by the trial judge in his charge to the jury, was in conformity with the decision of this court when the case was here upon a prior appeal (71 N. Y. 118), the difference in value between the crop actually raised from the seed sown and a crop of Bristol cabbage, such as would ordinarily have been produced that year. The judge also charged the jury that if they found for the plaintiffs, they should also allow them interest upon the amount of damage from the commencement of the suit, April 15, 1869, to the day of their verdict, May 30, 1878. The jury found the damage to be $2,000, and the interest upon this sum to be $1,277.49, and gave plaintiffs a verdict for the amount of the two sums. The defendants excepted to the charge as to interest, and this exception presents the only question for our consideration.

The law in this state as to the allowance of interest in common-law actions is in a very unsatisfactory condition. The decisions upon the subject are so contradictory and irreconcilable that no certain rule for guidance in all cases can be deduced from them.

The common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade. Mayne, Dam. (2d Ed.) 105; Higgins v. Sargent, 2 Barn. & C. 349. In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, even though to be paid for on a particular day, or for work and labor. Gordon v. Swan, 12 East, 419; Calton v. Bragg, 15 East, 223; Walker v. Constable, 1 Bos. & P. 306; Carr v. Edwards, 3 Starkie, 132; Nichol v. Thompson, 1 Camp. 52, note; Trelawney v. Thomas, 1 H. Bl. 303.

Thus the law remained in England until the statute of third and fourth William IV., which provides that upon all debts or sums certain, and in actions of trover and trespass de bonis asportatis, and in actions upon policies of insurance, the jury may in their discretion allow interest as part of the recovery.

We have no statute in this state regulating the allowance of interest in such cases. The rule early adopted here upon the subject was more liberal than that adopted in England. The allowance of interest was at first mainly confined to cases coming within the common-law rule as above defined, and to actions to recover money wrongfully detained by the defendant. The rule was then extended so as to allow interest upon the value of property unjustly detained or wrongfully taken or converted, and for goods sold and delivered, and for work and labor; and thus, by a sort of judicial legislation, the allowance of interest, as a legal right, was carried much further here than the scope of the English statute, where the allowance was placed simply in the discretion of the jury. At first the allowance of interest in actions of trover and trespass de bonis asportatis was in the discretion of the jury. Now it is held to be matter of legal right. Down to a recent period interest was not allowed upon unliquidated accounts or demands. Now that last landmark has been swept away, and the sole fact that a demand has not been liquidated is not a bar to the absolute legal right to interest.

A reference to a few recent decisions will show the present state, or as I might with propriety say, the uncertain state of the law upon the subject.

In Van Rensselaer v. Jewett, 2 N. Y. 135, the action was to recover rent payable in produce and work; and it was held that the plaintiff was entitled to recover interest from the time the rent fell due. It was admitted by Judge Bronson, writing the opinion, that the damages were unliquidated, and that there was no agreement for interest. He however laid down the general rule thus: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, he is chargeable with interest, from the time of default, on the specified amount of money, or the value of the property or services, at the time they should have been paid or rendered. In Dana v. Fiedler, 12 N. Y. 40, the action was on a contract to recover damages for the non-delivery of merchandise; and it was held that the plaintiff was entitled to recover not only the difference between the contract-price and the market-value, but also the interest on such difference; and that the allowance of interest did not rest in the discretion of the jury. In McMahon v. Railroad Co., 20 N. Y. 463, it was held that interest could be allowed upon an unliquidated disputed claim for work under a contract for the construction of a railroad. The allowance was based upon the curious ground that the debtor was in default for not having taken the requisite steps to ascertain the amount of the debt. In this case, Judge Selden, speaking of the case of Van Rensselaer v. Jewett, said that that case went a step further in the allowance of interest than the prior cases, "and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market-values; because such values in many cases are so nearly certain that is would be possible for the debtor to obtain some proximate knowledge of how much he was to pay." In Adams v. Bank, 36 N. Y. 255, and Mygatt v. Wilcox, 45 N. Y. 306, it was held that interest could be recovered in an action by an attorney upon his account for services. The value of the services does not seem in either case to have been disputed. In the first case, it was held that interest could be recovered from the time payment for the services was due; and in the latter case it was held that it could be recovered from the time the account was rendered by the attorney to his client. The right of recovery was based upon the theory that there was default in paying money due. In both cases the account appears to have been substantially liquidated, the liability to pay alone being litigated. In Smith v. Velie, 60 N. Y. 106, the action was to recover for services as housekeeper for defendant's intestate during many years. The plaintiff had from time to time received money and goods to apply upon her account. There was no agreement as to the measure of compensation, and it was held that the account was unliquidated, and that interest was not recoverable, even from the death of the intestate, as there was not a fixed market-value by which the rate of wages could be determined. In McCollum v. Seward, 62 N. Y. 316, the action was upon an unliquidated disputed claim for work and labor, and the referee allowed interest from the commencement of the action; and this upon the appeal of the defendant, was held not to be erroneous. In Mercer v. Vose, 67 N. Y. 56, the action was to recover for services rendered by the plaintiff to the defendant. The claim was unliquidated and contested. The referee allowed interest upon the balance found by him from the time plaintiff left defendant's service and demanded his pay. The action was commenced in about a month after such demand was made, and it was held that plaintiff was entitled to recover interest at least from the commencement of the action, and that if there was any error in allowing interest from an earlier date, it was too trifling to require correction. Upon the prior trial of this action, interest was allowed from the time a crop could have been harvested and sold, if the seed had been as warranted. This was held by this court to have been erroneous, on the ground that "the demand was unliquidated and the amount could not be determined by computation simply or reference to market values."

This brief presentation of decided cases shows how difficult it is to deduce from them any certain rule as to the allowance of interest. A statute could probably be framed which would produce more certain if not juster results. But it must be seen that to uphold this judgment, the rule as to the allowance of interest must be carried at least one step further than it has ever yet been carried: and we are unwilling that the step should be taken in this case.

After a very thorough examination of the cases in England and this country, I have not been able to find one prior to this one, in which it has been held that in a case where the claim was such as not to draw interest from an earlier date, interest could be allowed from the commencement of the action, unless the claim was such that the interest could be set running by a demand, the commencing of the action in such case being a sufficient demand.

In Feeter v. Heath, 11 Wend. 479, the action was to recover for work, labor and materials. There was no dispute as to the amount of plaintiff's claim; the only dispute was whether the defendant was personally responsible for the same. The agreement was to pay the plaintiff upon performance of his contract; and the court held that he was entitled to interest at least from the commencement of the action, as that was a legal demand of payment. Under the contract the plaintiff was entitled to interest from the time his money was due; and that was either when he finished his contract, or when he presented his bill and demanded payment; and the court held that the commencement of suit was a sufficient demand. If a demand was necessary under the circumstances of that case a demand before suit would have been just as effectual for the purpose of the interest allowance as the demand by the commencement of suit; and if such a demand had been made the plaintiff would have been entitled to interest at least from the time of such demand. In McCollum v. Seward, supra, the referee allowed interest from the commencement of the suit; and that was held not to be erroneous. It was not decided that it would have been erroneous to have allowed interest from an earlier date; and the same is true of the case of Mercer v. Vose. If in each of those two cases an account had been made and presented to the debtor, and payment demanded, it is probable that the court would have sustained an allowance of interest from such demand.

In Barnard v. Bartholomew, 22 Pick. 291, the action was to recover a balance of account for money and professional services; and it was held that "interest is to be allowed where there is an express promise to pay it, or where there is a usage proved from which the jury may infer a promise to pay;

and also it may be given as damages for the detention of a debt after the time when due by the terms of the agreement, or for neglect to pay a debt after a special demand." In Amee v. Wilson, 22 Me. 116, the action was upon an account for goods sold and delivered; and it was held that the plaintiff would be entitled to interest prior to the commencement of the suit, "by proof of an agreement to pay it, or by proof of a demand of payment, anterior to the date of the writ."

The cases last cited tend to show that where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date. But there is no authority for holding in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of the action. Why should the commencement of an action have such effect? The claim is no less unliquidated, contested and uncertain. The debtor is no more able to ascertain how much he is to pay. No new element is added. The conditions are not changed, except that the disputed claim has been put in suit; and there is no more reason or equity in allowing interest from that than from an earlier date. If interest as a legal right can be allowed in this case from the commencement of the action, then it must be allowed from the same date in all actions ex contractu, and logically it would be impossible to refuse it in actions ex delicto.

Therefore when this court, upon the prior appeal, decided that the nature of this claim was such that interest could not be allowed thereon from a time anterior to the commencement of the action, it really decided the question now presented.

The judgment of the general term must therefore be reversed, and the judgment entered upon the verdict must be modified by striking therefrom the sum of $1,277.49; and as thus modified it must be affirmed, without costs to either party as against the other upon the appeal to the general term and to this court. **All concur.**

Judgment accordingly.

MANSFIELD v. NEW YORK CENT. & H. R. R. CO.[1]

(21 N. E. 735, 114 N. Y. 331.)[2]

Court of Appeals of New York, Second Division. June 4, 1889.

Appeal from supreme court, general term, Second department.

Action for breach of contract by Luther E. Mansfield against the New York Central & Hudson River Railroad Company. A judgment for plaintiff was affirmed by the general term of the supreme court and defendant appeals.

John E. Barrows, for appellant. *W W. McFarland*, for respondent.

BRADLEY, J. I think the defendant's exception was well taken to the submission to the jury of the question of interest upon the amount of damages they should find against the defendant. The action was to recover for breach of contract. In such cases, whether interest is recoverable does not rest in the discretion of the jury, but is a question of law for the court, while in actions sounding in tort, when the recovery of interest is permissible, it is with some exceptions a question for the jury. Duryee v. Mayor, etc., 96 N. Y. 478. The rule upon the subject may appear to have been involved in some uncertainty, but now it seems to be reasonably well defined in this state. In McMaster v. State, 108 N. Y. 542, 15 N. E. Rep. 417, the claim was for damages founded upon a breach of contract for the supply of materials for the services in the construction of a public building. The damages resulted from the refusal of the state to permit the contractor to proceed with the work to its completion, as provided by the contract, and such damages consisted of a loss of profits, which would have been realized by performance of the work at the contract price. The court held that interest was not allowable even from the time of the commencement of the action or proceeding, because the claim was unliquidated, and "there was no possible way for the state to adjust the same and ascertain the amount which it was liable to pay." And reference was made to White v. Miller, 71 N. Y. 118, 78 N. Y. 393. That was an action to recover damages resulting from breach of warranty upon sale of a quantity of cabbage seed. The referee on the first trial allowed interest upon the damages from the time the crop would have been harvested. The court held that was an error, for the reason that "the demand was unliquidated, and that the amount could not be determined by computation simply or reference to market values." 71 N. Y. 134. On the next trial the plaintiffs were allowed to recover interest upon the amount of damages from the time of the commencement of the action. This was held to be error, and, after reviewing many prior cases on the subject, the court, by EARL, J., remarked that some of those cited "tend to show that where an account for services or for goods sold and delivered, which has become due and payable in money, although not strictly liquidated, is presented to the debtor, and payment demanded, the debtor is put in default, and interest is set running, and that, if not demanded before, the commencement of a suit is a sufficient demand to set the interest running from that date. But there is no authority for holding, in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of the action. * * * The claim is no less unliquidated, contested, and uncertain. The debtor is no more able to ascertain how much he is to pay. * * * The conditions are not changed, except that the disputed claim has been put in suit, and there is no more reason or equity in allowing interest from that time than from an earlier date." 78 N. Y. 399.

The judicial reason thus stated for the rule applied in that case is applicable to the present case, and is no less applicable to the damages awarded by way of *per diem* allowance for the time the jury found the plaintiff and his associate would have completed the work in advance of five months if the foundation had been completed on June 22, 1876, than the other class of damages allowed to the plaintiff. The alleged breach of contract was that when the stipulated notice was given the foundation was not ready for the superstructure which the plaintiff's firm agreed to erect upon it, and while they were not required, they were permitted, to proceed and charge the defendant with such damages. Mansfield v. Railroad Co., 102 N. Y. 205, 6 N. E. Rep. 386. Whether they could and would have completed the work in less than five months, if the foundation had been entirely ready when the notice was given, and, if so, how many days in advance of that time, were questions of very much uncertainty, as appears by the evidence, and so much so that there can be assumed to have existed no basis upon which the defendant could have made any estimate with a view to any adjustment of the amount as between it and the plaintiff. The alleged claim was unliquidated, and as uncertain in amount as any can well be conceived to be. It was necessarily in some sense speculative, as it involved the consideration of causes, the presence or absence of which could not be demonstrated, bearing upon the ability or inability of the contractor to do the work within any certain time if they had been permitted to proceed with the utmost economy and advantage within five days after the defendant's notice was given. This claim for damages was not for services, but was sought to be obtained and was recovered as prospective profits of which the plaintiff was deprived by the breach of the contract, and it was no less unliquidated for the purpose of the question now under consideration than it would have been if there had been no stipulated *per diem* allowance provided by the contract for the diligence of the contractors in doing the work. The amount of such claim for damages was entirely uncertain, and was closely contested by the defendant; so much so that a verdict for the defendant upon that branch of the case would have been supported by the evidence. This question of interest seems clearly to come within the doctrine of the case before cited, and should have been excluded from consideration on the trial; and in view of the reason for the rule, and the rule itself, so announced, the cases cited by the plaintiff's counsel do not support his proposition in this respect. In Parrott v. Ice Co., 46 N. Y. 361; Mairs v. Association, 89 N. Y. 498; Walrath v. Redfield, 18 N. Y. 457; Duryee v. Mayor, etc., 96 N. Y. 477,—the actions were in tort, and the question of interest was for the jury. In Van Rensselaer v. Jewett, 2 N. Y. 135, the action was for rent payable in specified articles with no sum mentioned, and Dana v. Fiedler, 12 N. Y. 41, was brought to recover damages for non-delivery of a quantity of madder pursuant to contract. In both these cases the market values of the property at the time stipulated for delivery the defendants had the means of ascertaining, and therefore when in default and required to perform they were able to ascertain by computation the amounts to which the plaintiffs were entitled. The court held that they were entitled to recover interest. In McMahon v. Railroad Co., 20 N. Y. 463, the action was to recover for work performed and materials furnished by the plaintiff in construction of the defendant's road. The defendant had refused to have measurements made by its engineer, which was a condition precedent to payment. The court referred to the doctrine of Van Rensselaer v. Jewett, and by SELDEN, J., said that the court there went as far as was reasonable to go, and held that interest was allowable upon the ground that defendant was in default for not having taken the requisite steps to ascertain the amount of the debt. In McCollum v. Seward, 62 N. Y. 316, and Mercer v. Vose, 67 N. Y. 56, the actions were to recover the amount due for services upon the *quantum meruit*. The claims were unliquidated, and the recovery of interest from the time of the commencement of the action was sustained. The former of the last two cases was decided upon authorities there cited, and was followed by the other. The doctrine of that line of cases is that in actions for services rendered or goods sold, etc., when the debtor is in default for not paying pursuant to his contract, the creditor is entitled to interest by way of damages. Newell v. Wheeler, 36 N. Y. 244; Mygatt v. Wilcox, 45 N. Y. 306. And that is upon the theory that the amount may be known or ascertained and computed, actually or approximately, by reference to market values. Sipperly v. Stewart, 50 Barb. 62; Van Rensselaer v. Jewett, 2 N. Y 135, 140; DeLavallette v Wendt, 75 N. Y. 579. There may be cases, from the nature of which it appears that this cannot be done, to which the rule allowing interest is not applicable. (Smith v. Velie, 60 N. Y. 106; De Witt v. De Witt, 46 Hun, 258,) and, so far as I have observed, it has not been extended to actions to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining the amount, by computation or otherwise, to which the other party is entitled. This case cannot be brought within the rule which renders the recovery of interest permissible. My conclusion is that the plaintiff was erroneously allowed to recover interest, and that the judgment should be modified accordingly. All concur, except POTTER, J., dissenting.

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[1] Dissenting opinion of Potter, J., omitted.

[2] Modifying 46 Hun, 680, mem.

SULLIVAN et al. v. McMILLAN et al.

(19 South. 340, 37 Fla. 134.)

Supreme Court of Florida. Feb. 18, 1896.

Appeal from circuit court, Escambia county; W. D. Barnes, Judge.

Action by A. M. McMillan and C. L. Wiggins, copartners under the name of McMillan & Wiggins, against M. H. Sullivan and Emily S. Sullivan, executor and executrix of D. F. Sullivan, deceased. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. L. Campbell, for appellants. W. A. Blount, for appellees.

LIDDON, J. This is the second appeal in this case. On the first appeal all questions of law presented by the case have been settled, except two matters now controverted between the parties. The nature of the case will fully appear by reference to the reported opinion and the statements of fact accompanying the same. 26 Fla. 543, 8 South. 450. The suit was brought by appellees, hereafter called the plaintiffs, against appellants, hereafter called the defendants, for the breach of a contract, whereby appellees agreed to deliver to the testator of appellants all the logs of certain specified dimensions, and free from certain specified defects, growing upon certain described lands of said testator. The breach alleged to have been made by the defendants after the death of said testator was in refusing to receive the remainder of said logs after a portion of the same had been delivered. From the evidence it appears that it would have taken appellees two years, or thereabouts, from the time the contract was broken by appellants, to have completed the contract on their part by delivery of the other logs embraced within the provisions of the same. After the appellants broke the contract by refusing to receive any more logs under the same, the appellees, with some of the same teams that had been engaged in the work required for the performance of such contract, engaged in other work of delivering logs under other contracts to other parties. The appellants sought to prove what gains and profits were made by the appellees by their own labor and the use of such teams in such other work and contracts during the time that it would have taken them to perform the contract with the appellants' testator, and for the breach of which the suit was brought. The circuit court excluded such evidence. The proof upon the trial did show the value of the use of these teams, and what other teams could have been engaged for, and were taken into consideration in estimating the plaintiffs' profits upon which the verdict was based. The appellants claim that such evidence should have been admitted; that they were entitled to prove the amount of such gains and profits; and that such amount should have been deducted by the jury from the amount found to be due the appellees, under the rule for the measure of damages established by this court. 26 Fla. 543, 8 South. 450. The first of the matters controverted, above alluded to, is whether such gains and profits made by the appellees in subsequent contracts should be deducted from the general amount of damages which, under the measure of damages established as stated, could be recovered by them. The second is whether any interest should be recovered on the damages caused by the breach of the contract for which the action was brought.

It is urged by appellants that the plaintiffs, when they received notice that the defendants would not further comply with or perform the contract, should have done all that reasonably lay within their power to protect themselves from loss by seeking another contract of like character, and that, the plaintiffs having sought and obtained such a contract immediately after the breach sued upon, the defendants were entitled to have a proportionate amount of the profits applied in mitigation of the damages for which they were liable. Otherwise it is contended that the plaintiffs would make two profits for the same time, and with the same teams, and that speculation would be substituted for compensation, which is the basis of the law of damages for breaches of contract. These propositions are undoubtedly correct when applied to some classes of cases. They have special reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services. Thus, in a contract for teaching in a school, which was broken by a refusal to receive the services, it was held to be the plaintiff's duty to make reasonable exertion to obtain other like employment in the same vicinity, and thus mitigate the damages. Gillis v. Space, 63 Barb. 177; Benziger v. Miller, 50 Ala. 206. The same rule was laid down for a similar breach of a contract with an actress. Howard v. Daly, 61 N. Y. 362. Where the plaintiff, owner of a portable sawmill, agreed to remove it to the farm of the defendant, and to saw a stated number of logs, to be furnished by the defendant, during certain seasons of the year 1865, and the defendant, after furnishing a portion, broke his contract by refusing to furnish more of such logs, but during the time he (plaintiff) would have been engaged in sawing defendant's logs he was offered other employment of the same kind, so that his mill need not have been idle, it was held that the damages caused by the breach sued upon should have been mitigated. Heavilon v. Kramer, 31 Ind. 241. The facts in the case of Frazier v. Clark, 88 Ky. 260, 10 S. W. 806, and 11 S. W. 83,—a sawmill case,—very much resemble those of Heavilon v. Kramer, and the same point was likewise determined. In a case of a breach of a contract to furnish a cargo for a vessel it was held to be "the duty of the master of a chartered vessel, on the failure or refusal of the charterer to furnish the cargo as agreed on, to avail himself of all ordinary means and proper opportunities to obtain another cargo; and if he neglect to perform this duty the owners cannot hold the charterer liable for the increased damages resulting from such neglect." Murrell v. Whiting, 32 Ala. 54. A very similar case, and a very similar holding, is Shannon v. Comstock, 21 Wend. 457. In Hodges v. Fries, 34 Fla. 63, 15 South. 682,—a suit for violation of a contract for rent of a store building by refusing to put plaintiff in possession of same,—it was held to be the duty of the plaintiff to mitigate the damages by accepting another store in the same vicinity, and equally well suited for her purposes, which was tendered to her.

The contract which was broken in the present case was not one for personal services, nor one which the parties contemplated should be performed with any special means or instrumentality. It was simply a contract for the delivery of certain logs at a certain place, and might have been performed by the plaintiffs with their own teams and personal labor, or by any other means or agency to which they might have seen fit to intrust the performance of the same. There is nothing in the contract to show that the execution of the same required all or any great portion of the time or personal attention of both or either of the plaintiffs; or that it was impracticable for plaintiffs to be engaged in other business and the performance of other contracts contemporaneously with the performance of the contract in controversy. We do not think the rule invoked as to mitigation of damages by subsequent earnings and profits applies to this case: A distinction is recognized between a case of the character of that now before us, and those to which we have alluded. 2 Greenl. Ev. § 261; Watson v. Brick Co., 3 Wash. 283, 28 Pac. 527; 1 Sedg. Dam. § 208; Wolf v. Studebaker, 65 Pa. St. 459; Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co., 100 Mo. 325, 13 S. W. 503; Nilson v. Morse, 52 Wis. 240 (text, 255) 9 N. W. 1; Cameron v. White, 74 Wis. 425, 43 N. W. 155; Field, Dam. § 339.

There was no legal obligation upon the plaintiffs in this case to enter upon the performance of other contracts for the benefit of the defendants. The supreme court of Wisconsin, in Cameron v. White, supra, where a contention like that of appellants in this case was made, as we think properly said: "As the plaintiffs could not enhance the damages against the defendant by their neglect to make the best of what they had on their hands, so they are not bound to lessen the damages by making other contracts, and performing them, and giving the benefit of the performance of such contracts to the defendant." A very full exposition of this subject, showing the difference in the rules applicable to contracts for personal service and those for the doing of a specific act, can be found in Watson v. Brick Co., supra. This discussion is too lengthy to insert entire in this opinion. The gist of the whole matter, the conclusion of the court, citing Wolf v. Studebaker, 65 Pa. St. 459, is thus stated: "The duty to seek employment is dependent upon the original contract being one of employment or hire. It is not applicable to every contract. * * * Ordinary contracts of hire and contracts for the performance of some specified undertaking cannot be governed by the same rule. That in one case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the other case, the loss of the party is the loss of the benefit of the contract. The damages may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independent of and totally disconnected from it, and from the party occasioning it. To plead the doctrine of avoidable consequences to such case, * * * 'would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.' * * * If the rule was to be observed that the damages proven must be direct and approximate, the same rule must be invoked in the reduction of damages." In Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co., supra, where an attempt was made to offer evidence similar to that excluded in the present case, it was said: "Where a servant is wrongfully discharged during his term, and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured or damaged by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory and the machinery, and the contract constituted no such relation as that of master and servant. It had the right to make as few or as many other contracts as it saw fit while executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded."

From what has been said by us and quoted with approval from the decisions of other courts it follows that we are of the opinion that the circuit court did not err in excluding the testimony offered, and that the doctrine that one who has been injured by the breach of a contract must do all that is reasonably within his power to mitigate the damages caused thereby does not prevail to the extent that one who is injured by a violation of an agreement to do a specific act not necessarily involving personal services must seek and perform other contracts for the benefit of one who, by breaking faith with him, has caused the injury.

The second matter, as already stated, is whether any interest is recoverable upon the amount of damages found by the jury against the defendants. The court instructed the jury that, if they found a verdict for the plaintiffs, they should assess the damages, with 8 per cent. interest, from whatever date the evidence showed the contract would have been completed. The jury, in its verdict, stated separately the amount of the damages assessed and the interest thereon, and judgment was entered for the aggregate amount. These proceedings are claimed to be erroneous, for the reasons alleged: (1) That no interest can be allowed in a recovery of unliquidated damages, and (2) that the evidence does not show any date from which the jury might calculate the interest. It cannot be doubted that the ancient rule is adverse to the assessment of interest upon unliquidated demands. More liberal ideas as to the allowance of interest prevail in modern, especially in American, authorities; and in the allowance of interest the distinction is practically obliterated between liquidated and unliquidated demands. A standard author upon the subject says: "The determination of the question whether interest can or cannot be allowed is by no means free from difficulty. The most general classification of causes of action with reference to interest is into liquidated and unliquidated demands. And it was formerly attempted to lay down the rule that interest could be recovered only on liquidated demands. But it will be perceived that, not only is the distinction itself not by any means easy to keep in view, but, besides this, there is no reason, in the nature of things, why the fact of a demand being unliquidated should debar the plaintiff from receiving or exempt the defendant from paying interest. And, finally, we do not find as a matter of fact that the line between cases in which interest is allowed and cases in which it is refused corresponds with the line between liquidated and unliquidated demands. * * * The objection to this classification lies not only in its difficulty of application, which might perhaps be surmounted; but in the fact of its unfairness. There is no reason why a person injured should have a smaller measure of recovery in one case than the other. * * * On general principles, once admit that interest is the natural fruit of money, it would seem that, wherever a verdict liquidates a claim, and fixes it as of a prior date, interest should follow from that date. * * * There are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. Of these the first is whether the demand is of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simple computation, or by reference to generally recognized standards, such as market price; second, whether the time from which interest, if allowed, must run,—that is, a time of definite default or tort feasance,—can be ascertained." 1 Sedg. Dam. (8th Ed.) §§ 299, 300. "The subject is without doubt a difficult one, and the decisions, as have been seen, are not harmonious. But by keeping in mind the fundamental principle, much of the difficulty may be avoided. As soon as it is the legal duty of the defendant to pay, he is liable for interest. As the defendant must have been in default before the action is brought if the plaintiff recovers, and as his default consisted in withholding money due, he should, it seems, get interest at least from the date of the writ. There seems to be good reason for going further, and holding him to be in default from a demand by the plaintiff for an accounting (made after a reasonable time) and a refusal to account. From that time the defendant cannot claim any right to withhold whatever balance was in fact due, and would have been found due if he had acceded to the plaintiff's demand. Before that, the plaintiff cannot claim any right to payment. Where interest is refused in actions of contract on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ." Id. § 315. We think the above quotations state the true rule. Another author, while affirming the proposition that interest is not allowed on unliquidated demands, makes an exception in favor of "demands based upon market values, susceptible of easy proof, though unliquidated until the particular subject of the demand has been made definite and certain by agreement or proof." 1 Suth. Dam. p. 610.

An examination of the authorities shows that the principles quoted above are sustained by various decisions. In State v. Lott, 69 Ala. 147, it is said: "Interest in this state has long been regarded, not as the mere incident of a debt, attaching only to contracts, express or implied, for the payment of money, but as compensation for the use or for the detention of money. Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident."

Without lengthening this opinion with further quotations, we simply cite, as having a direct bearing upon the subject, the following cases: Van Rensselaer v. Jewett, 2 N. Y. 135; Schmidt v. Railroad Co., 95 Ky. 289, 25 S. W. 494, and 26 S. W. 547; Brackett v. Edgerton, 14 Minn. 174 (Gil. 134); Boyd v. Gilchrist, 15 Ala. 849; Whitworth v. Hart, 22 Ala. 343; Adams v. Bank, 36 N. Y. 255; Selleck v. French, 1 Conn. 32. This court has allowed interest on an unliquidated claim of damages in Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co., 27 Fla. 1 (text, 140 et seq.) 9 South. 661, and expressed its disapproval of Ancrum v. Slone, 2 Speer, 594, in which it was held that interest could not be allowed on unliquidated damages.

Without setting forth even a brief summary of the evidence in the case, we think it sufficient to say that it was so exact and definite as to the amount of damage sustained by the plaintiffs, and the elements of the same, that it only required a simple computation by the jury to fix the amount. We think the case falls within the rule stated, that the damages could be readily liquidated and ascertained by the jury by simple computation, and that the plaintiffs were entitled to interest thereon.

We do not think the objection well taken that the evidence shows no date from which the jury could calculate the interest. The evidence shows sufficiently a date within which the plaintiffs could have completed their contract, viz. two years from the time the defendants made a breach of it. This time was long after the action was brought. The amount of interest allowed shows that it was calculated from such date. The court told the jury to allow the interest "from whatever date the evidence shows the contract would have been completed," and we think the proof sufficiently definite as to such a date. There was no reversible error in the instruction or the finding of the jury. By this holding we do not intend to determine whether the interest could have been calculated only from the date sufficient for the completion of the contract, or whether it should have been estimated from the breach of the same, or from the filing of the writ in the suit. We only determine that there was no prejudicial error to the defendants in the record. If the rule varied at all from the true rule for calculation of interest, such variance was in defendants' favor, and lessened the amount of the recovery against them.

Let the judgment of the circuit court be affirmed.

NOTE. Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., post, 416.

LOUISVILLE & N. R. CO. v. WALLACE.

(17 S. W. 882, 91 Tenn. 35.)

Supreme Court of Tennessee. Dec. 12, 1891.

Appeal from circuit court, Sumner county; H. C. Carter, Judge.

Action by W. L. Wallace against the Louisville & Nashville Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

J. J. Turner, for plaintiff. *S. F. Wilson*, *R. K. Gillespie*, and *Geo. W. Boddie*, for defendant.

SNODGRASS, J. The defendant in error, while in the service of the Louisville & Nashville Railroad Company as brakeman, sustained severe personal injury, resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for $15,000 damages and recovered judgment for $9,940. The railroad company appealed, and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken, and involve nothing new, so as to make their consideration in a written opinion necessary. The one material to be considered relates to the question of interest. The court told the jury it could assess plaintiff's damages with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at $7,000 with 7 years' interest $2,940, aggegating $9,940. It is objected in the assignment of errors that the charge on this question, and verdict, with judgment thereon, are erroneous. This involves a consideration of the question, what is the true measure of damages for such personal injury? The rule for determining damages for injuries not resulting in death, (where the statute fixes the measure,) and not calling for exemplary punishment, deducible from the decisions of this court since its organization in this state, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other states. 3 Sedg. Dam. (8th Ed.) § 481 et seq.; 5 Amer. & Eng. Enc. Law, pp. 40–44, and notes; Railroad Co. v. Read, 87 Amer. Dec. 260. As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment, and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing suffering and disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due, and the gross sum then for the first time judicially ascertained. The error of the court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion or other unlawful or fraudulent misappropriation, or detention of property or money, in which the rule applied by the circuit judge is held to be a proper one; not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give as damages an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted, and is not susceptible of definite and accurate computation. It never creates a debt, nor becomes one, until it is judicially ascertained and determined. Only from that time can it draw interest; and interest as damages cannot at any preceding time be added to it without changing and superadding a new element, never given in this state or any other in a similar case, so far as our investigation has discovered. The counsel of plaintiff, who cite many authorities supposed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "Interest," after stating that "it was generally allowed by law on two grounds, namely, on contract, express or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the money of another," it is stated in 11 Amer. & Eng. Enc. Law that, "where it is imposed to punish tortious, negligent, or fraudulent conduct, it is a question within the discretion of the jury." Page 380. For this proposition various authorities are cited, including Mr. Sedgwick on Damages, p. 374, (the reference being to paging of the fifth or earlier edition.) This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head, on pages 385, 386, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass and to property controversies only. In neither of these books is the proposition now thought to be sustained by them advanced,—that the measure of damages for a personal injury includes damages for detention of the supposed amount due. The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter 10 of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or court trying the case, allowed as part of the measure of damages. In these cases are enumerated and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken, as taken here, and actions for personal injuries excluded, because of the existence of a wholly different measure of damages respecting them. In this connection we quote section 320 in the volume and chapter referred to: "It sufficiently appears, from what has already been said, that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a property loss of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc. The measure of damage in such case seems nowhere to include this or be based upon this idea. Even in respect to injury or destruction of property, where the supreme court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to such injury of property or property right as had a fixed or certain value; and it is accordingly held in that court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. Tilghman v. Proctor, 125 U. S. 161, 8 Sup. Ct. Rep. 894.

The direct question we are considering also came before the supreme judicial court of Maine, and it was there held that the rule permitting damages equal to interest on value of property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained." (This is not material, however, as their statute gave no more nor less right than exists here.) Sargent v. Hampden, 38 Me. 581. The cases cited by the editors of the last edition of Sedgwick on Damages sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries are from Georgia and Pennsylvania. Ratteree v. Chapman, 79 Ga. 574, 4 S. E. Rep. 684; Railroad Co. v. Young, 81 Ga. 397, 7 S. E. Rep. 912; Railway Co. v. Taylor, 104 Pa. St. 306. These cases have all been examined, and fully sustain the text. One of the cases cited to the proposition in Amer. & Eng. Enc. Law was a Pennsylvania case, earlier than either of those to which we have referred. The case there cited, (Fasholt v. Reed, 16 Serg. & R. 266,) which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that court. Indeed, the Pennsylvania court seems hardly to have gone as far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other courts. In suits for the destruction of property that court has held that, while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from the time it occurred. Township of Plymouth v. Graver, 125 Pa. St. 24, 17 Atl. Rep. 249; Emerson v. Schoonmaker, 135 Pa. St. 437, 19 Atl. Rep. 1025. Of the other cases cited in Amer. & Eng. Enc. Law, we have examined those in 13 Wis. 31, (Hinckley v. Beckwith,) 36 N. Y. 639, (Vandevoort v. Gould,) and 30 Tex. 349, (Wolfe v. Lacy.) They all sustain the text as it is intended to be understood, and as we have herein explained, and doubtless the other cases do so. To the same effect are the cases of Lincoln v. Claflin, 7 Wall. 132; Dyer v. Navigation Co., 118 U. S. 507, 6 Sup. Ct. Rep. 1174; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920; Clement v. Spear, 56 Vt. 401; and cases from American decisions and reports cited in Rapalje's Digest, volume 1, pp. 1039–1041, under heads "Trover," and "When Interest may be Added," and volume 2, p. 1991, under head of "Interest." See, also, 1 Sedg. Dam. §§ 432–493, (8th Ed.) The effect and meaning of statements quoted from Amer. & Eng. Enc. Law and its reference to Sedg. Dam. are made perfectly clear when these cases and authorities herein added are examined, and the generality of expressions limited to the purpose of their use and the class of cases being considered. They were not dealing at all, nor intended to be understood as dealing, with the question of recovery for personal injuries, which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages. The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent and only to the extent of the injury. The circuit judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff, if he elects to do so. In that event the plaintiff is entitled to a judgment for $7,000, with interest from date of its rendition, and costs, and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases, (135 Pa. St. 437, 19 Atl. Rep. 1025,) citing several others, and is clearly the correct rule. In default of such remission, a new trial will be granted.

WILSON v. CITY OF TROY.

(32 N. E. 44, 135 N. Y. 96.)

Court of Appeals of New York. Oct. 4, 1892.

Appeal from supreme court, general term, third department.

Action by Walter V. Wilson against the city of Troy to recover damages for an injury to a horse resulting from a defective street. Plaintiff had judgment, which was affirmed at general term (14 N. Y. Supp. 721), and defendant appeals. Affirmed.

Wm. J. Roche, for appellant. Chas. E. Patterson, for respondent.

O'BRIEN, J. The record in this case presents two questions: First, whether the finding of the jury that the damage was the result of the defendant's negligence is sustained by any evidence; and, secondly, whether interest could legally be allowed by the jury in estimating the amount of the damages. On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, plaintiff's assignor, while being driven through South street in the city of Troy, fell into an open ditch or unguarded excavation, made during that day, and was permanently injured. There is little, if any, controversy with respect to the value of the horse, the extent of the injury, or the amount of damages. The night was dark, and it is not denied that there was evidence for the jury sufficient to sustain a finding of negligence on the part of some one by reason of the failure to protect a place of danger in a public street, by proper guards and lights. It was not shown that the city had any actual notice of the existence of the excavation, if made by private parties without its permission; and a sufficient period had not elapsed between the time of opening it and the accident to render the city liable on the ground of implied notice. The excavation was made for the purpose of conducting the water from the principal main in the street, through lateral pipes, into a private house. The owner of the house employed a firm of plumbers to do the work, which included the digging of the trench as well as laying and connecting the lateral pipes with the main in the street. The firm applied to the superintendent of the waterworks for men to open the trench in the street, and that officer directed laborers in the employ of the city to do so. The opening in the street was made by them, and they were paid for the work by the city, the plumbers refunding to it the sum so paid. The question is whether the men who dug the ditch were under the control and direction of the defendant, or subject to the orders of the plumbers engaged in performing a piece of work for the owner of the house.

The system of waterworks in Troy is the property of the municipality, and is under the management and control of a board of water commissioners, which may be regarded as a department of the city government. The commissioners are by law required to nominate, and the common council of the city to appoint, a superintendent of the waterworks, who is the executive officer in that department, and who, in this case, directed the men in the employ and pay of the city to make the excavation in the street. The board is authorized by law to extend the distributing pipes of the waterworks wherever they might think proper, and to make such alterations and improvements in the works, and in the management and preservation thereof, as they might deem necessary and expedient, and to employ such persons and assistants as they might require, to execute any of these purposes, which employés were to be paid for their services from the city treasury. The commissioners were also empowered to enact such by-laws, regulations, and ordinances as they should deem necessary for the protection of hydrants and water pipes, and the preservation, protection, and management of the waterworks. These by-laws, unless disapproved by a vote of two-thirds of all the members of the common council of the city, were to have all the force and effect of law. In pursuance of the power thus conferred by the statute, the board of water commissioners enacted by-laws and ordinances on the subject which were in force at the time the excavation in question was made. They, in effect, prohibited any person except the superintendent, and those employed by him or by the commissioners, to tap or make any connection with the main or distributing pipe, or to permit the same to be done, unless by the permission and under the direction of the superintendent. The learned counsel for the defendant contends that this regulation simply forbids the act of connecting the lateral pipes from the house with the main, and did not prohibit private persons from digging the necessary trenches and uncovering the main or distributing pipe, and hence that part of the work was done by the contractors who were employed by the owner of the house to make the connection, and not by the city. But a private individual had no right to dig in the street for this or any other purpose without the permission of the proper municipal authorities, and the object, as well as the language, of the ordinance indicates that it was intended to prevent the uncovering of the main, or any interference with the street in which it was placed, by private parties. At all events, the water board and its chief executive officer, the superintendent, in the discharge of the duties imposed upon them by the statute, might very properly give to it that construction, and act accordingly. To hold that such a by-law did not embrace within its object and purview the evils that might result from unguarded and unregulated interference with the bed of the street by private parties in order to reach the main, would be giving to it a construction altogether too narrow. The evidence tends to show that the water board gave to it the broader and more comprehensive meaning, as it was the custom and practice for years before the accident in question to make application to the superintendent for men to do the digging, and they were always furnished, as in this case. As between the owner of the house and the plumbers employed by her to introduce the water into her house, the digging was undoubtedly a part of the contract or work of the latter. If no main had been placed in the street at that time, they could also have contracted with her to procure its extension, but that part of the work would be subject to the action and regulations of the water board, and, while the contractors might be obliged to pay the city for the whole or some part of the expense, it would be none the less the work of the city. One of the plumbers testified that while he agreed with the owner of the house to do all the work, yet he knew then that it was the practice and custom to apply to the superintendent of the waterworks for men to do the digging and to make the connection, and acted upon the assumption that he had no right to do it. He also says that the men who made the excavation were not employed by him, but by the city. We think that, upon the proof, it could not be held, as matter of law, that the men who dug the trench and left it unguarded ceased for the time being to be the servants of the city, and subject to the directions of the superintendent, and became, while doing this job of work, the servants of the party employed to put in the lateral pipes into the house, as is urged by the learned counsel for the defendant. What party sustained the relation of master to the men who dug the trench, and had the control and direction of them, and was charged with the duty of directing them to properly guard the ditch,—whether the plumbers on the one hand, or the city, through the superintendent of the waterworks, on the other,—was the important question to be determined, and the trial court submitted it to the jury. Under all the circumstances, the question became one of fact, and this disposition of it was not error. Ward v. Fibre Co., 154 Mass. 420, 28 N. E. Rep. 299. This finding of the jury is conclusive upon us, and imports that the city itself, through one of its officers or departments, caused the trench to be dug, and left it unguarded, resulting in the damage complained of. In such a case the negligent act is imputable to the city, and the doctrine of actual or implied notice has no application, or, at least, is unnecessary, where one injured by the neglect of the city to properly guard a place made dangerous by its own act brings the action. Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; Walsh v. Mayor, etc., 107 N. Y. 220, 13 N. E. 911; Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344; Brusso v. City of Buffalo, 90 N. Y. 679; Russell v. Village of Canastota, 98 N. Y. 496; Nelson v. Village of Canisteo, 100 N. Y. 89, 2 N. E. 473; Ehrgott v. Mayor, etc., 96 N. Y. 273; Barnes v. District of Columbia, 91 U. S. 540.

The amount demanded in the complaint on account of the injury to this horse was $3,000, and the court instructed the jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this in so far as it authorized interest, and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge, and the defendant's counsel excepted. The jury afterwards came into court, and announced that they had found a verdict for the plaintiff for $3,000 and interest. The court then said: "You must compute the interest if you give interest. You will have to render your verdict in dollars and cents." This direction was complied with, and the verdict as entered included interest from the date of the injury, which result has been modified by the general term by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is that the jury could include in the damages interest upon the sum found to represent the diminished value of the horse in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception, therefore, presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. When interest may be allowed as part of the damages, in actions of this character, is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is perhaps impossible to formulate a general rule embracing every possible case. The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases. White v. Miller, 78 N. Y. 393. We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass de bonis asportatis, was given first in England by St. 3 & 4 Wm. IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. Beals v. Guernsey, 8 Johns. 446; Hyde v. Stone, 7 Wend. 354; Bissell v. Hopkins, 4 Cow. 53; Rowley v. Gibbs, 14 Johns. 385. The principle that the right to interest in such cases was in the discretion of the jury, was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of the property converted or lost to the owner by a trespass as matter of law. The reason given for this rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value. Andrews v. Durant, 18 N. Y. 496; McCormick v. Railroad Co., 49 N. Y. 315; Turnpike Co. v. City of Buffalo, 58 N. Y. 639; Parrott v. Ice Co., 46 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. Thomas v. Weed, 14 Johns. 255. We think the rule is now settled in this state that, where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedg. Dam. (8th Ed.) §§ 317, 320; Walrath v. Redfield, 18 N. Y. 457, 462; Mairs v. Association, 89 N. Y. 498; Duryee v. Mayor, etc., 96 N. Y. 477, 499; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun, 182, 188; Moore v. Railroad Co., 126 N. Y. 671, 27 N. E. 791; Railroad Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. 187.

There is a class of actions sounding in tort, in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc.; and still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of Sayre v. State, 123 N. Y. 291, 25 N. E. 163, and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but, in effect, holds the contrary. In that case a party appealed from the decision of the board of claims upon an award in his own favor, and the only question was whether, upon the evidence and findings, the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from $3,000 to $8,136. The claim was based upon the negligent act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The board of claims allowed no interest, nor did this court. In adding to the award a sum of over $5,000, this court acted, in some sense, as a court of original jurisdiction, and in making up the sum which was to constitute the final award it refused to allow an item of interest claimed. Now, it is admitted that a court or jury, charged with the duty of making up the amount of damages in such cases, may refuse to allow interest, and that is precisely what this court did, and nothing more, and therefore the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury, or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument, and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be considered as the judgment of the court on the question now under consideration. That question was not noticed in the argument, and was not involved in the case, except, perhaps, as a matter of discretion. For these reasons the judgment should be affirmed. All concur, except EARL, C. J., and FINCH and GRAY, JJ., dissenting.

Judgment affirmed.

TRIGG et al. v. CLAY et al.

(13 S. E. 434, 88 Va. 330.)

Supreme Court of Appeals of Virginia. July 23, 1891.

Appeal from decree of circuit court of Scott county rendered March 27, 1890, in a suit wherein T. P. Trigg, A. McBradley, and H. Fugate, surviving partners of themselves and James C. Greenway, deceased, partners doing business in the firm name Trigg, Fugate & Co., were complainants, and H. B. Clay, Jr., and W. D. Kenner, partners in the firm name of H. B. Clay, Jr., & Co., were defendants. The decree being adverse to the complainants, they appealed. Opinion states the case.

Danl. Trigg, for appellants. Holdman & Ewing and J. J. A. Powell, for appellees.

LACY, J. The suit is a foreign attachment in equity, brought to attach the property situated within the jurisdiction of the court belonging to non-resident defendants, and to subject the same to the satisfaction of the debt of the plaintiffs. The case is briefly as follows: The appellants, a firm of lumber merchants resident at Abingdon, in Virginia, made a contract by which they agreed to buy, at a stated price, lumber of agreed dimensions from the appellees, a firm of lumber getters, resident at Rogersville, in the state of Tennessee; the lumber to be delivered at Clinchport, in Scott county, in Virginia, from 500,000 feet to 700,000 feet thereof; and the plaintiffs agreed to accept the drafts of the said appellees to the amount of $3,000. And on the 28th day of November, 1888, the date of the contract, the appellee H. B. Clay, Jr., of the said firm, represented to the appellants that 300,000 to 400,000 feet were already cut and dry or drying; and that the residue, necessary to compensate for the $3,000 in drafts to be accepted at 60 days, should be delivered at Clinchport at the maturity of the drafts. The drafts were all made in the first week in December, 1888, a few days after the contract was made, which was on the 28th day of November, as has been stated. The lumber was not delivered,—not a foot of it,—and the drafts were neglected and allowed to fall upon the hands of the plaintiffs, when the lumber had not yet been delivered, and the drafts had been paid. So the plaintiffs, as had been agreed between the parties in case the said contingency should arise that the drafts should have to be paid before the lumber in sufficient quantity had arrived, drafted back upon the defendants for the money thus paid out; but this action was treated with derision by the appellee, and the draft dishonored. Upon the hearing, the circuit court decreed in favor of the plaintiffs for the $3,000 paid on the draft and the costs of protest, etc., and referred it to a commission to ascertain what damages the plaintiffs had sustained. It was proved that the defendants had absolutely refused to fulfill the contract upon the ground that the lumber had been priced too low by them, and also refused to refund the money paid them under the contract. The plaintiffs proved that they were lumber merchants, and, as was known to the defendants, purchased the lumber for sale; and they proved that they had actually placed this lumber to their customers at a profit which amounted to $1,000, but which they were made to lose by the wrongful act and fraudulent conduct of the defendants; and the commissioner reported that the said plaintiffs were entitled to this sum of actual damages incurred by them, estimating the profits on the maximum amount of the lumber to be delivered under the contract. But the defendants excepted to this report, "because the damage allowed is excessive, and not supported by law; because the commissioner had based his damages on supposed profits, instead of the market value of the lumber at the places of delivery." The circuit court by its decree of March 27, 1890, sustained these exceptions, and held that the plaintiffs were entitled to no specific damages for the non-performance of the contract set out in the plaintiffs' bill, and rested the matter where it had been placed by the former decree, which decreed in favor of the plaintiffs for the amount paid on the said drafts. From this decree the appeal is here. The idea of the circuit court was that the general rule applied which fixed the difference between the market price at the place of delivery and the contract price agreed to be paid. Upon the principle that the buyer could supply himself in the market overt, and when he had been compensated for the excess in the cost, over and above what his cost would have been under the contract, he had nothing more to complain of. But this case does not come within that principle, (1) because there is no market at that place from which, or in which, the plaintiffs could supply their need; (2) because there is no other market practically near enough to purchase the lumber and add transportation to the market price; (3) because the plaintiffs, relying on the promises and good faith of their bargainers, as they had a right to do, when they had themselves fully complied on their part by paying the purchase money therefor, had contracted to sell this lumber at a profit, which profit is the basis on which the commissioner assessed his damages.

In a case like this, with such circumstances as we have here, the case where there had been a contract to resell them at an agreed price, and when there is no market to afford a surer test, the price at which they were bargained to a purchaser affords the best and indeed very satisfactory evidence of their value. This was a purchase in that market, and there was no more for sale. In a case of such actual sale, why should the court go into conjecture as to what the goods were there worth? And again, if lumber could have been purchased and brought there at a lower price, there is not only no proof of it, but we have satisfactory proof to the contrary, because the defendants had the lumber, and were by their solemn contract under the highest obligations to deliver it; to say nothing of the requirement of common honesty, when they had agreed to do it, and had collected the purchase price. And yet they preferred to break their contract, and dishonored their bank obligation, rather than deliver this lumber at the agreed price, which they declared had been bargained at too low a price. In Wood's Mayne on Damages, § 22, it is said: "But, if they [the goods] cannot be purchased for want of a market, they must be estimated in some other way. If there had been a contract to resell them, the price at which such contract was made will be evidence of their value." In the American and English Encyclopædia of Law it is said: "Where there is no market at the place of delivery, the price of the goods in the nearest market, with the cost of transportation added, determines their value." Ice Co. v. Webster, 68 Me. 463; Griffin v. Colver, 16 N. Y. 489. In the case of Culin v. Glass-Works, 108 Pa. St. 220, it is said: "Upon the breach of a contract to furnish goods, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser by reason of the non-delivery." A distinction is drawn in some of the cases between a resale made at an advance subsequent to a contract of purchase and a resale made at an advance before the contract of purchase, which was known to the seller of the goods. Carpenter v. Bank, 119 Ill. 354, 10 N. E. Rep. 18. This is rather a fanciful distinction. It is not in accord with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But, if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber getter selling 700,000 feet of lumber to a dealer in lumber should know (1) that it was for a resale, (2) that this resale was to be on a profit, and (3) that he should know that his vendee would be damaged to the amount of his profit, if the vendor should prove faithless. But the true basis of the general rule is that when there is a market, the vendee cannot be damaged, except in the difference between what the lumber did actually cost him and what he had purchased it at from the seller to him. But this rule can have, upon reason, no application whatever to a case where there is no market, (1) because the disappointed purchaser cannot buy in that market when there is no market to buy in, and (2) because the market price cannot be ascertained when there is no market.

Under the circumstances of this case, the commissioner ascertained the true and just amount of the damages. It has been often held that profits which are the direct and immediate fruits of the contract are recoverable. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages. Wood's Mayne, Dam. p. 82. It has been held that, when the defendant refused to allow the contracts to be executed, the jury should allow the plaintiffs as much as the contract would have benefited them,—profits or advantages which are the direct and immediate fruits of the contract, entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very element, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. If the inducement to the plaintiffs to buy this lumber, they being lumber dealers, and trading in lumber, was not the profits they were to make by a resale, what was their inducement? And if the sellers did not understand and contemplate this resale on a profit, what contemplation on the subject can be reasonably ascribed to them? See Masterton v. Mayor, etc., 7 Hill, 62; Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224;) Fox v. Harding, 7 Cush. 516; Devlin v. Mayor, etc., 63 N. Y. 8; McAndrews v. Tippett, 39 N. J. Law, 105; Kendall Bank Note Co. v. Commissioners of the Sinking Fund, 79 Va. 563; Bell v. Reynolds, 78 Ala. 511. An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract; in other words, for the benefits and gain he would have realized from its performance, and nothing more. It is sometimes said that the profit that would have been derived from performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which certainly would have been realized but for the defendant's default are recoverable. It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit can be derived at all. It is sometimes said that speculative damages cannot be recovered because the amount is uncertain, but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result of the breach, but uncertain in amount, for which the plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining the amount. Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. Rep. 264; Taylor v. Bradley, 4 Abb. Dec. 363; Bell v. Reynolds, 78 Ala. 511. In this case the report of the commissioner was upon the correct principle, and the circuit court erred in sustaining the defendants' exception to the said report; for said exceptions should have been overruled, and the commissioner's report confirmed. The decree of the circuit court appealed from here is therefore erroneous, and the same will be reversed and annulled, and this court will render such decree as the said circuit court ought to have rendered.

HINTON, J., dissents.

LEWIS, P., (dissenting.) In this case I dissent from the opinion of the court and am for affirming the decree of the circuit court The case is narrowed down by the exception to the commissioner's report to the simple question of the measure of damages. The rule adopted by this court is, in my opinion, not only unjust, but contrary to the long-settled rule which governs in such cases. Here the measure of damages is held to be the loss sustained by the appellants by reason of their inability, on account of the default of the appellees, to fulfill certain contracts made by them for the sale and delivery of lumber to other parties. But those contracts were collateral to the contract between the parties to this appeal, and were, in point of time, subsequent thereto. They could not, therefore, have been in the contemplation of the parties when the contract was made, the breach of which is the subject of this controversy.

Decree reversed.

JORDAN et al. v. PATTERSON et al.

(35 Atl. 521, 67 Conn. 473.)

Supreme Court of Errors of Connecticut. April 15, 1896.

Appeal from superior court, Fairfield county; Robinson, Judge.

Action by Jordan, Marsh & Co. against James T. Patterson and others, doing business as the Patterson Bros. Knitting Company. Judgment for plaintiffs, and they appeal. Reversed.

John H. Perry and George E. Hill, for appellants. Morris W. Seymour, John C. Chamberlain, and Howard H. Knapp, for appellees.

ANDREWS, C. J. This action was brought to recover damages for the nonperformance of a contract. The plaintiffs are large dealers in dry goods at wholesale and by retail. The defendants are manufacturers of knit underwear. The complaint alleged generally that on the 16th day of March, 1892, the defendants agreed to manufacture for the plaintiffs a large number of knit undergarments, of various styles and at agreed prices, amounting in the whole to nearly 12,000 dozen, and to deliver the same at various times, but all before the 1st day of December, 1892, for which the plaintiffs were to pay; that the plaintiffs contracted for these goods with the intent, as the defendants knew, to resell the same to other parties; that at the date of said contract they had bargained to sell a part of said garments to other persons at a profit; that afterwards, and before the time when said goods were to be delivered, they bargained to sell the balance of the same to certain other persons at a profit; that the defendants delivered to the plaintiffs, in pursuance of the said agreement, 160 dozen of the said goods, but neglected and refused to deliver the remaining part,—and claimed damages to the amount of $10,000. The defendants' answer denied the making of the said contract alleged by the plaintiffs, and set up a different one,—a conditional one; and they said, that in performance of the contract so alleged by them, they furnished the said 160 dozen of said garments, but that the plaintiffs neglected to perform the conditions of said last-mentioned contract on their part to be performed, and therefore they (the defendants) did not furnish any more of said goods. The answer also demanded pay for the goods the defendants had so furnished, and damages for the nonperformance by the plaintiffs.

The finding of the court shows that there was evidence that the parties had had dealings with each other prior to the 10th day of February, 1892; that the plaintiffs had purchased of the defendants garments of their manufacture, some of which were then manufactured, and some of which were to be thereafter manufactured and delivered, and which were in fact so manufactured and delivered, but that on said day there was no contract subsisting between them; that between the said 10th day of February, 1892, and the 16th day of March, following, the plaintiffs sent to the defendants 14 separate orders for goods of their manufacture, each one duly numbered and signed, specifying the number, quality, style, and price of the goods ordered, and the date when they were to be delivered, as well as the date of payment; that on said 16th day of March, 1892, the defendants sent a letter to the plaintiffs as follows: "Office of the Patterson Brothers Knitting Co. Ladies', Gents', and Children's Fine Knit Underwear. Bridgeport, Conn., March 16, 1892. Messrs. Jordan, Marsh & Co., Boston, Mass.—Gentlemen: We are in receipt of the following contracts, for which we thank you. [Then followed a description of the 14 orders above referred to, by their numbers and amounts.] Yours, truly [Signed] H. B. Odell, Manager." It is also found that the defendants delivered to the plaintiffs 160 dozen of the goods mentioned in said orders. There was no claim made that Odell was not the duly-authorized agent of the defendants, or, at any rate, no claim that the question of his agency was not submitted to the jury with proper instructions. The case was tried on an issue closed to the jury, and the plaintiffs had a verdict for an amount in damages which, they assert, is very much less than they are entitled to have; and they have appealed to this court, alleging various errors in the trial court.

The plaintiffs claimed that the said orders, and the letter of March 16, 1892, constituted one contract, as to all the goods named in all the orders, and that it was the contract on which this action was brought; that the letter was afterwards ratified and confirmed by the defendants themselves as an acceptance of all the orders, and was so treated by them, because they delivered a portion of the goods under the orders generally. The defendants, on their part, claimed that the letter of March 16, 1892, was not an acceptance; that, if an acceptance at all, it was an acceptance of only some one of the orders; that each of the orders stated a separate contract, and must be separately declared on, and, as the complaint declared on one contract only, in no event could there be a recovery in this case on more than one of such orders. Upon this part of the case the judge instructed the jury as follows: "It is for you to say what language the paper [i. e. the letter of March 16, 1892] speaks, and what the intention was in the use of the language it contains. It is for you to say whether a person who sends such a paper as this to another under the circumstances here claimed, and then goes forward and begins to fill, and does fill, some of these very orders named in the paper so sent (if such be the facts), could fairly be said to have had no intention to speak the language of acceptance and promise in that paper, or had no intention, by the language used, to accept, and promise to fill, the orders he named. These are matters for you to determine after a careful and serious examination of the evidence and claims on both sides." The substance of this instruction was repeated by the judge twice or three times in the course of his charge, and at one time with language which apparently implied that the jury might select one of the separate orders, and, if that was broken, render a verdict for damages only as to such particular contract. This was error. There was no ambiguity or doubt as to the terms of the orders, or of the letter of March 16th, and there was no suggestion of any fraud. Under such circumstances, it was for the judge, and not for the jury, to say what these writings meant. It was a question of law, and not of fact. Gibbs v. Society, 38 Conn. 153, 167; Hotchkiss v. Higgins, 52 Conn. 205, 213; 1 Starkie, Ev. 429; 1 Greenl. Ev. § 277. The orders and the letter were offered as proof of a contract between the parties. If a contract at all, it was a contract in writing. As such, its interpretation —its legal effect—was a question of law, for the judge. Nor was such interpretation the less a question of law because the construction might have been aided by the use of extrinsic evidence, such as the business of the parties, their knowledge each of the business of the other, and their previous dealings, including as well what may be called the practical construction put upon the contract by the conduct and acts of the parties. The judge, by the aid of all the undisputed facts in the case, could put himself into the situation of the parties, and look at the contract from their standpoint. But, from whatever source light was thrown upon the contract, what its meaning was, what promises it made, what duties or obligations it imposed, was a question of law, for the judge. It was, after all, the legal reading and interpretation of what was written. See Smith v. Faulkner, 12 Gray, 251, 254; Brady v. Cassidy, 104 N. Y. 147, 155, 10 N. E. 131; Neilson v. Harford, 8 Mees. & W. 805, 823. In the light of the undisputed facts in this case, the trial judge should have instructed the jury that the letter of March 16, 1892, was an acceptance of all the orders named in it. And, as there was but one contract claimed to exist between these parties, such instruction would, in effect, have directed them to exclude from their consideration the conditional contract claimed by the defendants.

The general intention of the law giving damages in an action for the breach of a contract like the one here in question is to put the injured party, so far as it can be done by money, in the same position that he would have been in if the contract had been performed. In carrying out this general intention in any given case, it must be remembered that the altered position to be redressed must be one directly resulting from the breach. Any act or omission of the complaining party subsequent to the breach of the contract, and not directly attributable to it, although it is an act or an omission which, except for the breach, would not have taken place, is not a ground for damages. In an action like the present one, to recover damages against the vendor of goods for their nondelivery to the vendee, the general rule is that the plaintiff is entitled to recover in damages the difference at the time and place of delivery between the price he had agreed to pay, and the market price, if greater than the agreed price. Such difference is the normal damage which a vendee suffers in such a case. And, if there are no special circumstances in the case, a plaintiff would, by the recovery of such difference, be put in the same position that he would have been in if the contract had been performed. This, of course, implies that there is a market for such goods, where the plaintiff could have supplied himself. If there is no such market, then the plaintiff should recover the actual damages which he has suffered. There may be, and often there are, special circumstances, other than the want of a market, surrounding a contract for the sale and purchase of goods, by reason of which, in case of a breach, the loss to a vendee for their nondelivery is increased. In such a case the damages to the vendee which he may recover must, speaking generally, be confined to such as result from those circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It must be remembered, also, in attempting to carry out this general intention of the law in any given case, that any damages which the plaintiff by reasonable diligence on his part might have avoided are not to be regarded as the proximate result of the defendant's acts. In the present case the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. And if it was true the plaintiffs could not, by any diligence on their part, have relieved themselves by such purchase from any portion of the damages which they suffered.

There were various special circumstances by reason of which the plaintiffs claimed to recover damages. One was that they contracted for the said goods for the purpose of reselling them. It is averred in the complaint—and there appears to have been evidence on the trial tending to prove such averments—that at the time the goods were contracted for the plaintiffs had bargained to sell a portion of the said garments to other parties at a profit, and that the defendants had knowledge of the subcontracts. As to the profits on these subsales, the judge charged the jury that the plaintiffs were entitled to recover these as a part of their damages, because, as the judge correctly said, the existence of these subsales was known to the defendants at the time they contracted to furnish the goods, and the profits that were to be made must be considered as having been contemplated by them at that time.

It is also averred in the complaint that, soon after the time the contract was made, the plaintiffs, relying on the same, began to sell the balance of said garments to other parties at a profit, of which subcontracts they gave notice to the defendants a reasonable time before the date at which the goods were to be delivered. The judge charged the jury that these profits should not be allowed, because, as he said, these sales cannot be considered to have been in the contemplation of the parties at the time they made their contract. As the judge stated it, this ruling was correct. Notice to the defendants after their contract was entered into would not increase their liability. If these subsales could not reasonably be considered to have been in the contemplation of the parties at the time they made the contract, then the defendants could not be made liable for the special profits to be derived therefrom.

But there is an aspect of the question of the profits on these latter subsales—which seems not to have been very clearly presented—upon which the evidence of their terms might have been admissible. The defendants had knowledge that the plaintiffs contracted for these garments in order to resell them to others. They were chargeable with knowledge that the plaintiffs would make such profits as the market price of such goods would give them. If proof of the terms of these last-mentioned subsales was offered for the purpose of showing what the market price of such goods was at the time they were to be delivered, then the evidence should have been received. The market value of any goods may be shown by actual sales in the way of ordinary business.

It was alleged in the complaint that by reason of the default of the defendants the plaintiffs had been obliged to pay large damages to their vendees for their failure to deliver to them the goods so bargained to them, and they offered evidence to prove such a payment to one of their vendees, which evidence was, on objection by the defendants, excluded. In respect to this item of damage, the rule above stated furnished the proper test. In restoring an injured party to the same position he would have been in if the contract had not been broken, it is necessary to take into the account losses suffered, as much as profits prevented. And whenever the loss suffered, or the gain prevented, results directly from a circumstance which may reasonably be considered to have been in the contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss. Whether the circumstance from which the loss results, or the gain is prevented, is or is not one which may be reasonably considered to have been in the contemplation of the parties, is, from the necessities of the case, an introductory one, upon which the judge must, in the first instance, decide, before evidence either of losses suffered, or gains prevented, can be shown to the jury. When the admissibility of evidence depends upon a collateral fact, the judge must pass upon that fact in the first place, and then, if he admits the evidence, instruct the jury to lay it out of their consideration if they should be of a different opinion as to the preliminary matter. The particular evidence excluded in this case was that of Edward J. Mitton, one of the plaintiffs, to the effect that the plaintiffs had paid to William Taylor & Sons, one of their vendees, the sum of $641 as damages. Both the objection to this evidence, and the ruling upon it, seem to admit that this subcontract was one of which the defendants had notice. The objection to it was that it was not admissible under any allegation in the complaint. But precisely this sort of loss was alleged in the complaint and denied in the answer, and, unless other reasons existed for the exclusion of this testimony than the one claimed, it should have been received. If the sale to Taylor & Sons was one of those sales of which the defendants had notice at the time they made their contract with the plaintiffs, then the evidence was clearly admissible for the reason given by the trial judge when instructing the jury that the profits from these sales should be allowed.

For the purpose of proving the subsales, the plaintiffs offered the deposition of F. R. Chase, one of their traveling salesmen. In the early part of 1892 he was sent out by the plaintiffs to make sales by sample of some of the goods which the defendants were to manufacture. He was asked if he knew by whom these goods were to be manufactured. He said he did, through Mr. Campbell, the plaintiffs' buyer. This question and answer were objected to by the defendants, and ruled out. This objection seems to have been made on a total misapprehension of the object of the evidence. The witness was stating what he was to represent to his customers as to the manufacture of the goods he was trying to sell them. Both question and answer should have been admitted. Whether or not the goods, when they should be delivered, corresponded with the sample and with this statement, would have been quite another question.

One Deland, a buyer for the plaintiffs, testified. He was asked, respecting certain of the goods which the defendants had contracted to deliver to the plaintiffs, "At what price would these have been retailed?" On objection, he was not permitted to answer. Assuming that Deland had knowledge of the market price at which such goods would have been sold, it is very obvious that his answer would have been relevant, and should have been received.

The other questions made in the case, so far as they are material, would not be likely to arise on another trial. There is error, and a new trial is granted. The other judges concurred.

LAWRENCE et al. v. PORTER et al.

(11 C. C. A. 27, 63 Fed. 62, and 22 U. S. App. 483.)

Circuit Court of Appeals, Sixth Circuit. May 28, 1894.

No. 122.

In error to the circuit court of the United States for the Western district of Michigan.

This was an action by Ida A. Lawrence and Frank Lawrence, administrators of the estate of Lorenzo J. Bovee, deceased, against William T. Porter, Charles L. Ames, and Abel H. Frost. At the trial the court directed the jury to find for defendants. Judgment for defendants was entered on the verdict. Plaintiffs brought error.

Bundy & Travis, for plaintiffs in error. Walpole Wood and Taggart, Knappen & Denison, for defendants in error.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge. This is an action for breach of a contract of sale brought by the buyers against the sellers for failure to deliver a large quantity of lumber according to the terms of the agreement. The lumber was to be delivered by the defendants at their mill, on vessels to be furnished by the plaintiffs, during the shipping season of 1890. As each cargo was received, the buyer was to give acceptances, payable in 90 days. After the delivery of one cargo, the defendants refused, for no sufficient reason, to deliver the remainder upon the terms of the bargain, but offered to supply the lumber needed to complete the bill at a reduction of 50 cents on each 1,000 feet, for cash on delivery over the rail of plaintiffs' vessels and at the time when delivery was required by the broken agreement. The buyers stood upon their contract, and demanded delivery upon the credit therein stipulated, and refused to take the lumber offered by the delinquent sellers on any other terms than those contained in the agreement. There was evidence tending to show that the quantity and quality of lumber contracted for, and of the dimensions designated, could not be procured at the place of delivery from others than the defendants, or at any other available market in time for shipment according to the terms of the contract; that the lumber was intended for resale at Tonawanda, N. Y.; that defendants were so informed; and that the market value of such lumber at Tonawanda, after deducting freight and hauling, was considerably above the contract price.

The evidence of the plaintiffs established that the defendants were able to comply with their proposal to deliver the lumber required by the agreement during the period fixed for delivery in the agreement. This makes it unnecessary to consider the plaintiffs' assignment of error to the ruling of the court that the burden of proof was on the plaintiffs to show that defendants could not have complied with their offer to fill out the bill for cash at a reduced price. There was a jury and verdict for the defendants in compliance with a charge to that effect.

The case must turn upon the error assigned upon the charge of the court, the other errors assigned being immaterial. The view of the circuit court upon the question of law upon which this case in its present attitude must turn, as expressed in the rulings and charge, is well summarized in the concluding paragraph taken from the charge: "In this case the court is of the opinion that upon the case made by the plaintiff, although he has established a breach of contract, yet the evidence shows that the defendants offered to furnish the identical articles contracted for at a price not greater than the contract price, and so no legal damage has resulted to the plaintiff in consequence of the breach of the contract, and for that reason the plaintiff is not entitled to recover. This being the judgment of the court, as a matter of law upon the facts, as the plaintiff claims them to be, there remains only the duty of rendering a verdict for the defendants."

The general rule is that, for a breach of contract to deliver goods under an executory contract of sale, the measure of recovery is the difference between the contract price and the market value at the place of delivery at the time the contract was broken. If the goods cannot be procured at the place of delivery, then resort must be had to the nearest available market. Tower Co. v. Phillips, 23 Wall. 471. The damage thus measured is the ordinary and usual damage incident to such a breach, and is recoverable under a declaration which simply sets out the contract and the breach. Plaintiffs' declaration contains the usual common-law counts. Under the practice in Michigan, the defendants demanded from the plaintiffs a bill of particulars, setting out the particular damages they had sustained. The bill was delivered, but it did not show any damages other than the general damages recoverable under a general count.

It is true that a plaintiff is not always limited to the recovery of general damages. There may be such special circumstances as will entitle him to recover special damages, "which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effects." But, if the plaintiff has sustained other damages than those which usually flow from an ordinary breach of such a contract, he must in his pleading particularize his special loss, so that the defendant may prepare himself with evidence to meet such unusual claim. Benj. Sales, § 870; Parsons v. Sutton, 66 N. Y. 96; Barrow v. Arnaud, 8 Q. B. 604. Neither the declaration nor the bill of particulars sets out or particularizes any special damages sustained by plaintiffs. They are therefore limited to "general damages," which, for such a breach as the one declared on, are measured by the difference between what they had agreed to pay and the sum for which they could have supplied themselves with lumber of the same character at the place of delivery, or, if not obtainable there, then at the nearest available market, plus any additional freight resulting from the breach. In case of such breach, the plaintiffs are entitled only to indemnity in a sum equal to the loss they have sustained as a consequence. Hence it results that if the plaintiffs are able to replace the goods by others, bought at a less or equal price at the place of delivery, or other near and available market, they have sustained no loss, and are entitled at best to nothing more than nominal damages. Neither the declaration nor bill of particulars alleges any inability to pay cash, as demanded by the defendants. We do not, therefore, consider whether special damages might not, under some circumstances, be recovered, which were sustained by reason of the inability of plaintiffs to pay cash for lumber to replace that which defendants had contracted to sell them on credit. It follows that if plaintiffs were able to buy, and did not, they cannot throw upon the defendants any special losses incident to their own failure to mitigate the injury as far as they reasonably could. Sedg. Meas. Dam. (8th Ed.) § 741; Marsh v. McPherson, 105 U. S. 709; Warren v. Stoddart, Id. 224.

The ground upon which the defendants refused to carry out the sale was ostensibly their unwillingness to extend to the plaintiffs the credit of 90 days provided for in the agreement of sale. They have not endeavored to show that there were any circumstances which justified this breach of the agreement. Credit is often a material element in a contract of sale, whereby the buyer is enabled to operate upon the capital of the seller. Credit extended without interest is, in effect, a sale at the stipulated price less the interest for the period of credit. The damage for a breach of contract to pay money at a particular date is the lawful rate of interest for the period of default, unless some other penalty is imposed by the agreement. So it would seem that if the buyer, in order to supply himself with the articles which the seller was obligated to sell, is compelled to buy from another, and to pay cash, one element of recovery for the breach would be interest upon his purchase for the period of credit. It is the well-settled duty of the buyer, when the seller refuses to deliver the goods contracted for, to do nothing to aggravate his injury. Indeed, he must do all that he reasonably can to mitigate the loss. If the buyer could have supplied himself with goods of like kind, at the place of delivery or other available market, at the time the contract was broken, and neglected to do so, whereby he suffered special damages by reason of the breach, he will not be suffered to recompense himself for such special damage, for the reason that to that extent he has needlessly aggravated the loss. The contention of the plaintiffs is that they could not supply themselves at the time the contract was broken with lumber of the qualities and sizes mentioned in their contract, either at the place of delivery or at any other available market; that they were not required to buy from the defendants, who were already in default; that to have bought from them would operate both to encourage breaches of contracts, and would have been a waiver of all other right of recovery for the breach of their agreement; that to have accepted the proposal of the defendants to supply them for cash at the reduced price would simply have been to substitute one contract for another, thereby enabling defendants to escape all liability for a deliberate and indefensible violation of the bargain. They therefore insist that the measure of damage was the difference between the contract price and the market value at Tonawanda, N. Y., less freights to that point; the evidence showing that the lumber was bought for resale at Tonawanda, and that defendants were informed of that purpose.

For a breach of contract of sale, the law imposes no damages by way of punishment. The innocent party is simply entitled to recover his real loss. If the market value is less than the contract price, the buyer has sustained no loss. This is axiomatic, and needs no citation of authority. If the plaintiffs could have bought at East Jordan, or at any other convenient and available market, at the time of the breach, lumber of like kinds, at the same price or a less price, it would be clear that they would have sustained no general damages. If they refused to avail themselves of such opportunity, and thereby sustained special and unusual loss, by reason of not having lumber of the kinds called for by the contract, or by being deprived of a profit resulting from a resale at Tonawanda, they could not recover such special damage, for such damage might have been avoided by replacing the undelivered lumber by other of like kinds. The fact that they could only buy from the defendants does not affect the duty of plaintiffs to minimize their loss as far as they reasonably could. The offer to sell for cash at a reduced price more than equalized the interest for 90 days, which was the value of credit. There seems to be no insurmountable objection in thus permitting a delinquent contractor to minimize his loss. The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. Warren v. Stoddart, 105 U. S. 224; Deere v. Lewis, 51 Ill. 254.

In Warren v. Stoddart, above cited, the essential facts were these: Stoddart & Co. were publishers of an edition of the Encyclopaedia Britannica. It was a book sold only by subscription. Certain territory was assigned to the plaintiff, in which he was to have the exclusive right to sell the book on subscription. He was to have the book on a credit of 30 days, thus enabling him to deliver it to his subscribers, and obtain the means to make his own payments. Warren obtained a large number of subscriptions to Stoddart's publication. After delivering a few numbers, he ceased to canvass for the Stoddart publication, and became a canvasser for a rival edition. Thereupon Stoddart refused to extend further credit to Warren, and demanded cash on all his orders to supply his subscribers for the Stoddart edition. Warren demanded credit, and refused to pay cash. Being unable to get the Stoddart edition from any other source, he, at great expense to himself, substituted the Scotch, or rival edition, with which he furnished his subscribers for Stoddart's edition. For the loss thus sustained he sued. After discussing the effect upon Warren's contract, because of his ceasing to canvass for Stoddart and taking up a rival work, the court proceeded to decide the case upon the second ground of defense presented, saying: "But, even conceding that the provision referred to remained in force after Warren had declined to go on under the contract, it does not follow that, upon the refusal of Stoddart to give Warren a credit of thirty days upon the books, the latter could obtain a cancellation of the orders he had taken for Stoddart's reprint, and substitute orders for the Scotch edition, and charge the expense of so doing to Stoddart. The claim that, upon a simple refusal of Stoddart to allow him a thirty-days credit upon the books as he ordered them, he could go on and substitute other orders for another book, and charge Stoddart with the expense of substitution, amounting to $30,000, is, to say the least, a remarkable one. The damage sustained by Warren because he did not get the thirty-days credit which he thinks he was entitled to is not to be measured in that way. The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. Wicker v. Hoppock, 6 Wall. 94; Miller v. Mariner's Church, 7 Me. 51; Russell v. Butterfield, 21 Wend. 300; U. S. v. Burnham, 1 Mason, 57, Fed. Cas. No. 14,690; Taylor v. Read, 4 Paige, 561. The course pursued by Warren was not necessary to his own protection. He might have paid Stoddart cash for the books required to fill his orders, or have allowed Stoddart to fill the orders and divide the profits of the business between them, on equitable terms. The law required him to take that course by which he could secure himself with the least damage to the defendant in error. Instead of this, he unnecessarily destroys a valuable interest of Stoddart in the business in which they were jointly engaged, and then seeks to charge him with the great expense and damage which he brought on himself in so doing. If Stoddart violated his contract with Warren in refusing to fill his orders except for cash, the measure of Warren's damages would be the interest for thirty days on the amount of cash paid on his orders. As no proof was given to show that Warren had ever paid cash for any books ordered by him, he would only be entitled, in any view of the case, to nominal damages."

The opinion in Warren v. Stoddart rests upon the theory that the buyer does not surrender or yield any right of action he may have for the breach of contract. It rests wholly upon the duty of mitigating the loss by replacing the goods by others, if they are obtainable by reasonable exertion. If this duty be such as to require him to buy from the delinquent seller; if the article can be obtained only from him, or because he offers it cheaper than it can be obtained from others, such a purchase from the seller is not the abandonment of the original contract by the substitution of another, nor would the purchase operate to the seller's advantage, save in so far as the damage resulting from his bad faith was thereby reduced. If the seller offers to sell for cash at a reduced price, or to sell for a less price than the market price, though in excess of the contract price, with the condition that it should operate as a waiver of the original contract, or of any right of action for its breach, then the buyer would not be obligated to treat with the seller, nor would the seller's offer, if rejected, operate as a reduction of damages.

The case of Deere v. Lewis, cited above, was a case much like the one under consideration. The goods could be procured only from the defendant, who offered the goods for cash at 5 per cent. less than the contract price. It was held that plaintiff could recover only nominal damages, inasmuch as he could have bought the goods for less than the contract price from the delinquent seller.

The cases of Havemyer v. Cunningham, 35 Barb. 515, and Manufacturing Co. v. Randall (Iowa) 17 N. W. 507, have been cited as sustaining a different result. The first case rested upon a state of facts very unlike those here involved. The other seems to have gone off upon the apprehension that, if the buyer supplied himself by a purchase from the delinquent seller, he thereby abandoned his contract, and substituted a new agreement in place of the broken bargain. That apprehension seems unjustified. But, however that may be, the case of Warren

v. Stoddart is controlling. The offer after the breach by the defendants to sell the lumber necessary to complete the contract was not coupled with any condition operating as an abandonment of the contract, nor as a waiver of any right of action for damages for the breach.

The question as to whether there was error in not directing a verdict for nominal damages was not presented by any exception in the circuit court, nor raised by any assignment of error here. We do not, therefore, consider it.

Judgment affirmed.

HOFFMAN v. CHAMBERLAIN.

(5 Atl. 150, 40 N. J. Eq. 663.)

Court of Errors and Appeals of New Jersey. November Term, 1885.

On appeal from a decree of the chancellor, whose opinion is reported in Chamberlain v. Hoffman, 38 N. J. Eq. 40.

P. S. Scovel, for appellant.

C. A. Bergen, for respondent.

REED, J. Sarah Chamberlain, the complainant below, together with one Amelia B. Ellis, sold to Mary W. Miller, now Hoffman, certain household furniture for the sum of $1,800. A part of the property sold belonged to Mrs. Chamberlain, and a part to Mrs. Ellis. It was paid for in the following manner: $500 in cash were paid to Mrs. Ellis, and to her were given, also, two notes of $150 each, and one note of $100; to Mrs. Chamberlain were given nine $100 notes. All of Mrs. Ellis' notes are paid. Three of the Chamberlain notes are paid, leaving still unpaid six of the notes given to her. At the time these notes were given a chattel mortgage was executed to Mrs. Chamberlain, to secure all these notes, to the amount of $1,300. Mrs. Chamberlain filed her bill to foreclose this mortgage. The defense to it is that some of the articles sold did not belong to either Mrs. Ellis or Mrs. Chamberlain. All the articles to which title is alleged to have failed were sold as the property of Mrs. Ellis, and all the notes given to her have been paid. Only the remaining six notes given to Mrs. Chamberlain are outstanding, and it is as security for the payment of these that the chattel mortgage is being foreclosed. If this transaction is to be treated as involving two sales, with a distinct consideration for each, then there is no defense to the present suit.

The failure of title to Mrs. Ellis' goods could not affect the consideration paid to Mrs. Chamberlain under a distinct contract. Upon a consideration of all the circumstances surrounding the sale, I think the affair was understood to be a single transaction, in which all these household goods were sold for a single price. The two ladies who sold were relatives, and had been intimately connected in business. They desired to sell all the furniture in the house to one person. The values which they fixed to the separate articles were for the purpose of determining their separate interests in the consideration. The notes were made in part to one and in part to the other vendor, for the purpose of convenience. The chattel mortgage was given to secure all the notes, without regard to whom they were payable. So far as the purchaser felt concerned in the affair, all she wished was to get all the furniture as it stood in the house. She was not concerned in the proportion of interest in the entire stock, so long as she got the title to it all. The price was agreed upon, not in view of any part, but of the whole lot. The consideration was single, in which both vendors were jointly concerned, and both vendors were equally responsible for any defect in the title to the goods sold for which this consideration passed.

In what articles was there a failure of title? It is claimed that title failed to a portion of the goods which Mrs. Ellis had bought of a Mr. Hutchins, and which Mr. Hutchins recovered of Mrs. Chamberlain by an action of replevin. It appears, however, that the replevin suit against Mrs. Chamberlain was undefended; no notice having been given to Mrs. Ellis or Mrs. Hoffman of the pendency of the action. Nor does the evidence in this cause show that Mrs. Ellis had no title to those articles. I think that she had, and that the transaction by which she got possession of the articles was a sale, and not a bailment; and, although she had not paid for them, she could and did pass a title to Mrs. Chamberlain upon which she could have successfully stood in a defense to the replevin suit. The remaining articles in which there was an alleged failure of title were the three Baltimore heaters. As to these, it appears that they belonged to the landlord of Mrs. Ellis. Although she put one in the rented premises, the arrangement by which this was done contemplated that it should remain there after the termination of her lease. The other two were placed in the house by the landlord. In respect to these heaters, neither of the vendors to Mrs. Chamberlain had title, and there should be a deduction from the amount due upon the six outstanding notes for this failure of title.

The question then arises, what is the proper measure of the deduction to be allowed? Perhaps no feature relating to the sale of chattels has been so little and so unsatisfactorily discussed and determined in previous adjudications as this. It seems to be the settled doctrine in the English courts that, where there is a failure of title to all the chattels sold, the purchaser can treat the transaction as presenting an instance of an entire failure of consideration, and may sue for the money paid. Eichholz v. Bannister, 17 C. B. (N. S.) 708. There is, however, no case decided in their courts that holds that the right of a purchaser is limited to a recovery of this sum in an action brought, not for the money paid, but for a breach of the warranty of title. The rule is entirely settled that for a breach of a covenant for title to real property the measure of damages is the consideration paid, and the interest upon such sum. This rule, early settled in the English courts, is the rule in this and many other states. This rule has also been adopted in many states in this country as equally applicable to breaches of the warranty of title to personal property. The following cases display the extent to which this rule has here been adopted: Noel v. Wheatly, 30 Miss. 181; Ware v. Weathnall, 2 McCord, 413; Wood v. Wood, 1 Metc. (Ky.) 512; Crittenden

v. Posey, 1 Head, 311; Ellis v. Gosney, 7 J. J. Marsh. 111; Arthur v. Moss, 1 Or. 193; Goss v. Dysant, 31 Tex. 186.

A perusal of the opinions in these cases, and the reasons given for the adoption of this rule in the sale of chattels, is not calculated to vindicate the wisdom of the rule. The doctrine, so far as it is applicable to breaches of the covenants in real conveyances, rests upon grounds which appertain to the character of real estate. The reason for the adoption of this rule in this class of actions is set forth at length by Kent, in the leading case of Staats v. Ten Eyck, 3 Caines, Cas. 111. The rule is an exception to the general principle which underlies the measure of damages for breaches of contract; namely, the standard of compensation. This latter rule applies to actions for breaches of warranties of quality in the sale of chattels to its full extent. In what respect the loss resulting from a breach of the warranty of title differs from that resulting from a breach of the warranty of quality in dealing with personal property is difficult to conceive. Outside of the vice of extending an exception to a general rule in any event, there appears to be no reason why the rule of recovery should not be uniform in actions upon both kinds of warranties. Nor do the cases in which the exceptional rule applicable to damages for breaches of real covenants has been extended to warranties of title to chattels, in my judgment, present any reason for such prejudicial action. In nearly all of these cases the question arose in states when and where slavery prevailed, and was in respect to breaches of a warranty of title to slaves. The reason stated in many of the cases for the adoption of the rule was the precarious and fluctuating character of that kind of property. In other cases the court is content with the citation of the early case of Armstrong v. Percy, 5 Wend. 536, as the authority for the rule.

In regard to the latter case, it may be remarked that the rule is drawn from a remark of the judge who delivered the opinion in that case, in a single sentence, unsupported by authority or reason. And this remark was made in the face of the result in the previous case of Blasdale v. Babcock, 1 Johns. 517, in which there was a recovery of the value of a horse, and costs, upon a warranty of title. The matter actually decided in the case of Armstrong v. Percy was that, where an action had been brought against the purchaser by the real owner, who was not the vendor, the purchaser could recover from the vendor the money paid, besides the costs of the suit which he was obliged to defend. There was no suggestion that the rule controlling, in this respect, an action for breach of this kind of warranty, differed from the rule in actions upon other kinds of warranties. The cases cited—namely, Curtis v. Hannay, 3 Esp. 82; Caswell v. Coare, 1 Taunt. 566; Lewis v. Peake, 7 Taunt. 153—were all actions for breach of warranty of quality, and the measure of damages in these cases was shown to have been dependent upon the pleadings. In the first two of these cases no special damages were set out in the declaration, and there was nothing but the amount of the consideration to show what was lost, so that was ruled to be the measure of damages. In the last case, the claim for damages having been broader, it was permitted to the plaintiff to recover, in addition to this, the costs of a suit against him by his vendee, to whom he had sold with a similar warranty.

There is nothing in the matters decided in the case of Armstrong v. Percy which fixes, as a rule, that for the present kind of warranties the measure of damages is limited to the consideration paid, and interest. The rule, I think, in all actions of this kind, is compensation. Where no special damages are set forth, the measure of the loss is the value of the property purchased; and, where there is no evidence of value but the consideration paid, that will be taken as the standard of value. Where there is a failure of title to a part, or an inferior title only is sold, the loss is the difference between the property as conveyed and its value had the title been as warranted.

In support of the view that this general rule, applicable to damages, appertains to actions upon breaches of warranties of title to chattels, are the cases of Grose v. Hennessey, 13 Allen, 389; Rowland v. Shelton, 25 Ala. 217; and the text of Mr. Sedgwick, on Measure of Damages, 294. My opinion is that there should be a deduction, in this case, of the difference between the value of the entire lot of chattels sold and the value of the lot without the heaters. The only evidence of the value of the entire lot is what it was sold for, namely, $1,800. The evidence in regard to the value of the heaters fixes their value at about $200. Adopting these values, there should be a deduction for the latter sum from the notes, as of the date of the sale, leaving due $400 and interest.

The decree should be reversed.

Decree unanimously reversed.

BERKEY & GAY FURNITURE CO. v. HASCALL.

(24 N. E. 336, 123 Ind. 502.)

Supreme Court of Indiana. May 1, 1890.

Appeal from circuit court, Elkhart county; JAMES D. OSBORNE, Judge.

Action by the Berkey & Gay Furniture Company against Milo S. Hascall. Judgment was rendered for defendant, and plaintiff appealed.

J. M. Vanfleet, *W. H. Vesey*, and *C. W. Miller*, for appellant. *H. D. Wilson* and *W. J. Davis*, for appellee.

OLDS, J. This was an action by the appellant against the appellee to recover a balance of $374.62 for goods sold and delivered. The answer is in three paragraphs, setting up a counter-claim. It is alleged in the first paragraph that on August 26, 1881, the appellee had just completed his hotel, with 50 rooms, and was in need of new furniture therefor, without which he could not carry on his business, as appellant well knew; that on said day, for the purpose of furnishing said hotel in all its parts with suitable furniture, the appellant agreed with him to furnish said furniture and every part thereof complete, and set it up in proper shape and condition in his hotel rooms, ready for use, by September 15, 1881; that said rooms were irregular and different in size, dimensions, and construction, and for the purpose of making said furniture suitable for said rooms, appellant measured said rooms, and a list of goods was agreed upon, and at the foot thereof appellant executed a memorandum in writing as follows: "We agree to put these goods all in good order, (set up in hotel, without charge, except freight and cartage,) castored, with bracket wood-wheels on all beds. All bureaus and washstands to have good wood-wheels on rubber castors. Goods to be ready the 15th of September. Any goods not according to order, or not satisfactory, may be returned free of charge. Goshen, Aug. 26th, 1881. BERKEY & GAY FURNITURE CO. T. M. MOSELEY." The paragraph then alleges that he was ready, able, and willing to comply with his part of said contract, but that appellant, with full knowledge of all the facts, violated said agreement, in this, to-wit: It failed to deliver any of said goods prior to September 30, 1881, whereby he lost the daily use of 29 rooms, of the rental value of $2 per day for each room from September 15th to September 30th; that appellant failed to deliver said goods prior to January 18, 1882, except as set forth in the complaint; that said furniture was purchased to be delivered in sets and suits for specific rooms and places, as set forth in said foregoing memorandum, but the articles so delivered were not in sets or suits, but in disjointed and mismatched pieces, and were not and could not be properly set up or used until all were delivered; by reason of which he lost the daily rental value and use of 20 of said rooms, worth to defendant $2 each per day from October 1, 1881, to January 18, 1882, inclusive; that because of such failure he was compelled to turn away, and did turn away, 20 persons each day, who desired to become guests at said hotel, whereby the income and profits of said hotel business were diminished $50 per day. The second paragraph of the counter-claim alleges that on the 26th day of August, 1881, he had just completed his hotel, at a cost of $40,000; that it contained 40 rooms (besides dining-room, kitchen, etc.,) suitable for the entertainment of guests; that it was then operated and run by him in the business of hotel-keeping, and was so operated for the next two years; that the rental value of said hotel, when furnished, was $5,500 per year; that on said 26th day of August, 1881, he was in great need of furniture to supply and furnish 30 of the aforesaid guest rooms in said hotel, which rooms were then unfurnished and empty, in which condition they were of no rental value to defendant, all of which appellant well knew; that to supply and furnish said rooms and hotel as aforesaid, appellant promised and agreed with him to deliver and set up, in good order and condition, the furniture mentioned in its complaint by the 15th day of September, 1881, according to written specifications and agreement, (copied into first paragraph above;) that appellant failed and refused to deliver said goods until January 18, 1882, during which time, from September 15, 1881, to January 18, 1882, he was deprived of the use and rental value of said hotel, and the several rooms therein, which use and rental was of the value of $2,000. The third paragraph of the counter-claim alleges all the matters contained in the other two paragraphs, showing a little more minutely the rooms for which the different articles of furniture were designed. A reply in general denial was filed to the answer.

The cause was submitted to a jury for trial, and the jury returned a special verdict in the words and figures following: "Special Verdict. (1) We, the jury, find that the plaintiff contracted with the defendant, on the 26th day of August, 1881, to sell and deliver to defendant the several items of property mentioned in plaintiff's complaint, at and for the price of each article as stated in plaintiff's complaint, and was to deliver the same and set the same up in defendant's hotel in Goshen, Ind., and have the same ready for use in defendant's hotel, known as 'Hotel Hascall,' by or on the 15th day of September, 1881; that plaintiff, at the time of making such contract, knew the purpose for which said furniture was to be used. (2) Plaintiff failed and neglected to deliver any of said furniture until the 30th day of September, 1881, and thereupon and thereafter, until the 18th day of January, 1882, plaintiff delivered said furniture at the times, and in the specific articles, as severally set forth by the plaintiff in the complaint herein. (3) Defendant paid plaintiff the sums credited to defendant in plaintiff's complaint, and returned to plaintiff the items of furniture, as stated in plaintiff's complaint, to the amount of $121.85, thus leaving unpaid of the purchase price of said furniture the sum of $374.62, March, 1882, as stated by the plaintiff. (4) We further find that defendant, at and just prior to the making of said contract, had reconstructed and built his hotel building in the city of Goshen, Ind., at a cost of $40,000, and defendant was proprietor and manager thereof, and had within said hotel thirty (30) rooms that were unfurnished, and when so unfurnished were of no use or value to the defendant; that all said rooms remained vacant, and of no use or value to defendant, from the 15th day of September, 1881, to the 30th day of September, 1881, on account and by reason of the failure of plaintiff to comply with its agreement aforesaid; that twenty-three (23) of said rooms remained vacant, and of no use to defendant, from the 30th day of September, 1881, until the 19th day of October, 1881, because of the failure of plaintiff to comply with said contract; that seven (7) of said rooms remained vacant and of no use from the 19th day of October, 1881, to the 5th day of November, 1881, because the failure of plaintiff to comply with said contract; that from the 5th day of November, 1881, until December 15, 1881, six (6) rooms of said hotel remained vacant, and of no use to defendant, because of the nonfulfillment of said contract by the plaintiff; that the use of each one of said rooms to the defendant was nothing, when unfurnished. (5) We further find that the rental value and use of each of said rooms, when furnished with the furniture designated for same in said contract, would have been to the defendant 75-100 dollars per day during said time. (6) If, upon the foregoing facts, the law be with the plaintiff, then we find for the plaintiff; but, if the law be with the defendant, then we find for the defendant. JOHN A. SMITH, Foreman." The appellant moved for judgment on the special verdict, which motion was overruled, and an exception reserved. The appellee moved for judgment on the special verdict, and the court sustained said motion, to which the appellant excepted. Final judgment was then entered in favor of appellee for $554.63, and costs.

Appellant filed a motion for new trial, which was overruled, and exceptions reserved. The appellant assigns as error: (1) That the court erred in overruling appellant's motion for judgment in its favor upon the special verdict. (2) That the court erred in sustaining appellee's motion for judgment in his favor on the special verdict. (3) That the court erred in overruling appellant's motion for a new trial. It is contended that, under the facts found, the appellee is only entitled to compensatory or general damages, and not for the special damages set up as a counter claim.

We think the facts found in the special verdict entitled the appellee to recover the special damages claimed. In Vickery v. McCormick, 117 Ind. 594–597, 20 N. E. Rep. 495, the court says: "The general rule is that a party who fails to comply with his contract to furnish goods is liable for the value of the goods in the open market at the time of the failure. But, when similar goods cannot be purchased in the market, the measure of damages is the actual loss sustained by the purchaser in not receiving the goods according to the contract." See Rahm v. Deig, 23 N. E. Rep. 141, and authorities there cited. In Hadley v. Baxendale, 9 Exch. 341, Sedg. Lead. Cas. 126–136, the court states what we deem to be the true rule governing the assessment of damages in such cases as this. In that case it is said: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i. e.*, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The facts found by the jury show that the appellee, at and just prior to August 26, 1881, had reconstructed and built his hotel building in the city of Goshen, Ind., at a cost of $40,000, and that appellee was proprietor and manager thereof, and had within said hotel 30 rooms that were unfurnished, and when so unfurnished were of no use or value to the appellee; that upon said day he contracted with the appellant to sell and deliver to him the several items of property mentioned in the appellant's complaint, which consisted of the necessary furniture to furnish said rooms, at and for the price of each article as stated in the complaint, and agreed to deliver the same and set the same up in appellee's hotel, and have the same ready for use in said hotel by or on the 15th day of September, 1881; that the appellant, at the time of the making of said contract, knew the purpose for which said furniture was to be used. The contract was to furnish the furniture for 30 rooms in an hotel, and set it up in the rooms, and have it ready for use and occupancy by a day named. From these facts it necessarily follows, as a conclusion, that the party contracting to furnish the same knew that the rooms were valueless as hotel apartments when unfurnished; that the furniture was necessary to enable the purchaser to use and occupy the same, and operate his hotel; and that the appellee would be deprived of the use of such rooms for such purpose until it complied with its contract. The facts found further show that the appellant commenced furnishing the furniture soon after the date when it was all to have been furnished and put up in the rooms, furnishing part at one time and part at another. The facts show the appellee had reconstructed and rebuilt a valuable hotel, and was operating it himself, and the damages naturally resulting from the breach of the contract, according to the facts found, were what the rooms would have been worth to appellee furnished according to the contract more than they were worth to him unfurnished, during the delay in complying with the contract. Appellee built the house for a particular purpose, and was having it furnished for such purpose. He was not bound to rent out the rooms for another purpose, even if he could have done so. If there had been a breach and a total failure of the appellant to have furnished the whole or any part of the furniture, and the appellee had been notified that he was not intending to furnish it, then the appellant would have been liable for the difference in value of the furniture between its price in the open market and the contract price, as well as the loss of the use of the rooms for the time necessary to have procured the furniture elsewhere; but in this case the appellant furnished the furniture, and appellee accepted it, so that the damage was the loss sustained by reason of the delay. We think the loss of the use of the rooms as they were to be furnished might fairly be considered to have been contemplated by the parties at the time of the making of the contract. In Richardson v. Chynoweth, 26 Wis. 656, it was held that a defendant failing to deliver an article. knowing the purpose for which it was purchased, was liable for the profits the purchaser would have made. See 1 Sedg. Dam. (7th Ed.) 218–239; Field, Dam. § 250; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. Rep. 686.

It is contended that the facts found do not state the damages correctly; that, if the plaintiff is entitled to recover, the amount he is entitled to recover would be the difference between the rental value of the rooms, unfurnished and furnished. This objection we do not think available for a reversal of the judgment. When special damages of this character are recoverable, it is the damage the party himself has sustained that he is entitled to recover. If A. purchase grain of B., and at the time A. has a previous contract to sell and deliver grain to C., and A. purchases the grain of B. with a view of filling his previous contract with C., and C. is advised of that fact, and the contract is such that on failure to deliver B. becomes liable to A. for the profit he would have made, the damage recoverable is the profit A. would have made; and that amount might be determined by a finding of the facts showing the amount A. was to pay B. for the grain, and the amount he would have received from C. for the same. So, in this case, the amount of damage that the appellee was entitled to recover was the difference in value to the appellee in the rooms, furnished and unfurnished, for the time they remained unfurnished by reason of appellant's failure to furnish the furniture; and that amount is determined by finding what the rooms were worth to the appellee unfurnished, and what they were worth furnished, for the time he was deprived of the use of them for the purpose for which they were to be used. The jury has found as facts that the use of the rooms unfurnished was worth nothing to the appellee during that time, and furnished they would have been worth 75 cents per day, and the number of days each room was unfurnished from the date appellant contracted to set up the furniture in the rooms is also stated and found in the verdict, and the gross amount may be determined by a mere computation. The facts found in the special verdict entitle the appellee to a judgment for the amount of the damages found to have been sustained by him. Fassion v. Landrey (this term) 24 N. E. 96. The facts found cover all the issues in the case, and that is all that is required by a special verdict.

It is further contended that the court erred in not sustaining the motion for new trial, for the reason that the judgment rendered upon the verdict is in excess of the amount found due the appellee by the verdict, but this question is not presented by the record. If the judgment does not follow the verdict, or is not such a judgment as the party was entitled to have rendered upon the verdict, to present any question as to the amount or form of the judgment, it was necessary to make a motion to modify the judgment, and properly reserve exceptions in case the motion was overruled. It follows, therefore, from the conclusion we have reached, that there is no error in the record for which the judgment should be reversed. Judgment affirmed, with costs.

BARNES v. BROWN et al.

(29 N. E. 760, 130 N. Y. 372.)

Court of Appeals of New York. Second Division. Jan. 20, 1892.

Appeal from supreme court, general term, first department.

Action by Oliver W. Barnes against George H. Brown, and James Seligman, Jesse Seligman, and David Seligman, as executors of Joseph Seligman. The general term dismissed the complaint as to the executors, and reversed the referee's decision, which awarded only nominal damages against Brown. Plaintiff and Brown appeal. Affirmed as to the executors, and reversed as to Brown.

The other facts fully appear in the following statement by Bradley, J.:

The action was brought to recover damages for the alleged breach of contract of which the following is a copy, to-wit: "Oliver W. Barnes having, by instruments bearing even date herewith, assigned and transferred to us, George H. Brown and Joseph Seligman, all claims and demands against the New York City Central Underground Railway Company, and his title to certain subscriptions to the capital stock of said company, and also any interest he may have in a certain alleged contract made with the said company by Francis P. Byrne, and having also transferred sixty shares of stock in said company: Now, we, George H. Brown and Joseph Seligman, do hereby, in consideration of the premises and of one dollar to us paid by the said Oliver W. Barnes, agree that we will, upon certain amendments to the charter of the said New York City Central Underground Railway Company, now pending before the legislature of the state of New York, becoming a law, pay, or cause to be paid, to the said Oliver W. Barnes, his representatives and assigns, the sum of twenty-seven thousand five hundred dollars in currency of the United States, being the amount of certain advances made and services rendered by the said Barnes to the said railway company; and also that we will cause to be delivered to the said Barnes or his assigns at the time of the payment of the said money two thousand shares of the capital stock of the said railway company, which said stock is to be full-paid stock. And we further agree with the said Oliver W. Barnes, his representatives and assigns, that, in the event of the said amendments not becoming a law at the present session of the legislature, we will either cause said money to be paid, and said two thousand shares of stock delivered to the said Barnes or his assigns, or have reassigned to the said Barnes or his assigns the claims, demands, and rights so assigned to us, and transfer to him or his assigns the said sixty shares of stock so transferred to us the next day after the close of the present session of the legislature of New York. And we further agree that not more than one hundred additional shares of the stock of said company shall be issued until the said payment be made and stock delivered without the consent of the said Barnes, and that so much of said one hundred shares as shall be issued shall be transferred to the said Barnes, if we do not exercise our option of paying said twenty-seven thousand five hundred dollars, and delivering said two thousand shares on the failure of the said amendments to become a law at the present session. And we further agree that no contract for the construction of the railway of the company shall be entered into without the consent of the said Barnes until the said money shall be paid and the stock delivered. In witness whereof we have hereunto set our hands and seals this twenty-sixth day of March, in the year one thousand eight hundred and seventy-two. George H. Brown. [L. S.] Joseph Seligman. [L. S.]" When, in 1882, this action was commenced, Joseph Seligman had died, and executors of his will were joined as defendants with Brown. The alleged default was in the failure or refusal to deliver to the plaintiff the 2,000 shares of the stock of the railway company, as Brown and Seligman had undertaken by the contract. The plaintiff sought to recover $200,000 and interest. The referee found that the stock had no value, and directed judgment against Brown for nominal or six cents damages; and as to the defendants (executors) the referee directed judgment of dismissal of complaint. Judgments were entered accordingly. The general term affirmed the latter, and reversed the judgment for nominal damages, and as to the defendant Brown granted a new trial.

Edward C. James and Ira Leo Bamberger, for plaintiff. Hamilton Odell and John E. Parsons, for defendants.

BRADLEY, J., (after stating the facts.) The main controversy has relation to the rule or measure of damages applicable to the breach of the contract upon which this action was founded. While the plaintiff claims that damages cannot be less than $200,000 and interest, it is insisted on the part of the defense that they were only nominal. Before proceeding to the consideration of the question in that respect, reference may properly be made to the facts out of which the alleged claim arose. The New York City Central Underground Railway Company was organized under an act incorporating it, and authorizing the company to construct and operate an underground railway in the city of New York, passed in 1868, and amended in 1869. The authorized capital stock of the company was $10,000,000. At the time the contract of March 26, 1872, was made, the plaintiff was president of the company. He then had some claims against it, and only 117 shares of capital stock had been issued, of which he held 63 shares. By the transfer of the 60 shares to Brown and Seligman, they took the control of the organization of the company. The amendments to the charter then pending in the legislature did not become a law, and consequently it was optional with them to either retain their purchase and pay, or surrender what they had received, and put an end to the contract. They, however, concluded to treat it as effectual, and assumed the undertaking to perform, and afterwards did pay to the plaintiff the $27,500, and did deliver to the plaintiff certificates of 2,000 shares of the capital stock of the company. This was apparently full performance, but in fact was not, because that so delivered was not paid stock; and when this was discovered by the plaintiff he offered to return the certificates, and demanded such as he was entitled to. Further performance was refused, and this action followed. The only question as against the defendant Brown was one of damages; and the referee found that at the time when he and Seligman undertook to deliver the stock to plaintiff it had no actual or market value, and determined that he was entitled to recover nominal damages only. The stock certainly had no market value. None was in the market. This finding and conclusion were challenged by the plaintiff's exceptions. By reference to the condition of the company, it is seen that the total amount of money received by it on account of subscriptions to its stock was $5,700, and that was received in 1869 and 1871. The other credits to the capital stock account were in demand loans and special services rendered the company. The various efforts prior to 1872 were unsuccesfully made to raise money for the purpose of construction of the railway, and the reason why the bonds of the company could not be negotiated was that it had been unable to obtain subscriptions to its capital stock to pay for right of way. The land and consequential damages incident to the construction of the railway were estimated at 5,000,000; and the expenditures by the company for work done towards construction and for land and land damages did not exceed $4,000. The indebtedness of the company was about $350,000. This was, in general terms, the situation of the company when the contract of March 26, 1872, was made; and it was known as well to Brown and Seligman as to the plaintiff. Whatever of value they took by the contract was in the franchise of the company, and was dependent upon the use which could be made of it by way of the construction and operation of an underground railway. While the futility of the enterprise tended to show that it never had any actual value, there evidently was hope and expectation of success entertained by Brown and Seligman when they elected to retain the benefit of the contract, and it is in that view insisted by the plaintiff that the stock then had a value which to him may at that time have been available, although later it turned out to have had none, and therefore he lost whatever he may have realized by its conversion, if it had in due time been delivered to him. There is apparently some force in this suggestion, but it is entirely speculative, assuming that the stock then in fact had no actual value as well as no market value. There was some conflict in the expert evidence upon the subject, founded upon the situation of the company. While that on the part of the defendants was that the stock had no value, that of the witnesses called by the plaintiff was to the effect that it was, as the situation then appeared, worth par. It may be observed that the plaintiff held the stock represented by the certificates so delivered to him until about September 1, 1874, upon the assumption that it was full-paid stock, before his discovery that it was otherwise.

The finding of the referee that the stock had neither actual nor market value was supported by evidence, and for the purposes of this review must be deemed conclusive. But it is insisted by the learned counsel for the plaintiff that the plaintiff should nevertheless have recovered the $200,000 and interest upon it because he was entitled to the stock or to a sum which it would cost to obtain it. As a general rule, the damages which a party is entitled to recover against another for breach of contract are such as will indemnify him for the loss he has suffered by the default; and it is with a view to that result that the rules for ascertaining and awarding damages have been adopted. The purpose of the rule in that respect is to leave the party in no worse, and place him in no better, condition than he would have been if the act or default complained of had had not been committed. It was with a view to such measure of relief, and the adoption of a rule to accomplish it, that the doctrine which gave the highest market value up to the time of the trial as the measure of damages for conversion of property of fluctuating value, as held in Markham v. Jaudon, 41 N. Y. 235, and some prior cases, was overruled in Baker v. Drake, 53 N. Y. 211, and the market value for a reasonable time within which to replace the property was adopted as furnishing the guide to the proper measure of damages and the more satisfactory means of indemnity. In that case the defendants, pursuant to an arrangement with the plaintiff, had purchased stocks to hold and carry, subject to his order, so long as he kept his margin good. The defendants disposed of the stock in violation of the agreement; and the court there held substantially that an amount sufficient to indemnify a party injured for the loss naturally, reasonably, and proximately resulting from the act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the proper measure of recovery when punitive damages are not allowable; and that "the advance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale would afford a complete indemnity." The principle upon which the determination of Baker v. Drake rested was that the measure of the plaintiff's damages was governed by the opportunity which was afforded by the market for him within a reasonable time to replace the stock or the refusal of the defendant to do so. 66 N. Y. 518; Colt v. Owens, 90 N. Y. 368. And in Wright v. Bank, 110 N. Y. 237, 18 N. E. 79, the same rule was held in like manner applicable where stock fully paid for by the owner is, through the honest mistake of the pledgee, converted by him, and he refuses to replace it. Thereupon the owner may do so within a reasonable time, and the highest market price within that time is the proper measure of damages. This is the recognized rule in this state, and it is applicable alike to actions upon contract as in tort.

In the present case there was no market to resort to for the plaintiff to supply himself with the stock, nor any market value to furnish the measure of damages. The rule applied in the cases last cited was not, therefore, in that sense applicable to the situation in the case at bar. A subscription, however, to 2,000 shares of the capital stock of the railway company, and payment of the full amount to the company, would have produced the stock, and it may be assumed that it could not otherwise have been procured. It is upon that ground that the plaintiff insists that the liability of the defendant is measured by that amount. This would have been so if the agreement of Brown and Seligman had been to pay the plaintiff $200,000 in the stock of the company. Then their indebtedness or liability would not have been controlled by the value of the stock, but would have been fixed by the contract; but when the specific quantum of the stock was made the consideration in that respect for the plaintiff's sale to them, on their failure to deliver it he was entitled in damages to the equivalent of that which they had undertaken to render. In the absence of special circumstances, in an action for conversion of personal property, as well as one for failure to deliver it in performance of a contract, where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation. Ormsby v. Mining Co., 56 N. Y. 623; Parsons v. Sutton, 66 N. Y. 92. No special circumstances were alleged in the complaint to take this case out of the general rule. Nor was there any fluctuation in the value of the stock succeeding the time for its delivery, under the contract to qualify the application of such rule.

The damages which a party ordinarily may recover for breach of contract are those which naturally flow from the default; and, if the contract is made in reference to special circumstances affecting the measure of compensation, such circumstances may be treated as within the contemplation of the parties, and constitute a basis for the assessment of damages. Booth v. Mill Co., 60 N. Y. 487. They come within the meaning of special damages, and must be the subject of allegation in pleading to entitle the party to make proof of them, unless objection in that respect be waived. In the present case, no facts of special character relating to damages were alleged, nor were any established by the evidence further than the mere fact that the stock of the company had no market value. If, notwithstanding that fact, the stock may have had an actual value a different question would have been presented; for the plaintiff could not be subjected to loss, nor could the defendant be permitted to profit, by the fact that the stock had no market value at the stipulated time for delivery. Then other means than those afforded by the market would be resorted to under the contract, as within the contemplation of the parties to ascertain the amount requisite to full indemnity to the plaintiff. Sternfels v. Clark, 2 Hun, 122, 70 N. Y. 608. There may be cases in which damages have no support in market values, where the value is peculiar to the party entitled to performance, and relief will be given accordingly. Scattergood v. Wood, 14 Hun, 269, 79 N. Y. 263; Parsons v. Sutton, 66 N. Y. 92. And when the remedy at law for compensation is inadequate or impracticable, it may be found in equity by way of specific performance. Pom. Eq. Jur. § 1401. Those are supposed cases to which the principles of law adapt remedies when they arise. But in the case at bar the stock not only had no market value; it also had no actual value. Nor does it appear that it would have been of any value to the plaintiff, or of any substantial benefit to him, for any purpose, if he had received it. The defendant Brown, and his associate, Seligman, did not, by the contract, undertake to do anything to give any future value to the stock of the company. Thus we have the simple case of a contract to deliver a certificate for a certain quantity of capital stock then having no existence, and when due and thereafter having no value. The claim that, because the creation or issue of this worthless stock would cost its par value, the plaintiff is entitled to recover that sum, does not seem to have the support of any well-defined principle of law. But it is said that, with knowledge of the situation, Brown and his associate absolutely agreed to deliver the stock, and therefore they were bound to pay the amount requisite to accomplish it without regard to the value of the stock, or of its beneficial use to the plaintiff. In an action at law to recover damages for breach of contract, the question of damages is one of indemnity; and in that respect the remedy founded upon this contract does not differ from that upon any other contract for default in the delivery of property which a party has unqualifiedly undertaken to deliver for a consideration received. In Dana v. Fiedler, 12 N. Y. 40, the measure of damages for failure to deliver madder pursuant to contract was founded upon the market value at the time of the default. The question there arose upon the exclusion of evidence speculative in character, and which for that reason was held inadmissible upon the question of such value. Nor does Scattergood v. Wood have any essential application in principle to the case at bar. In that case there was an element of exemplary damages against the defendant, who had willfully deprived the plaintiff of the use of a test machine designed by him for a special purpose, in consequence of which he was put to the expense of constructing another for such purpose. Of this intended use the defendant was advised when he appropriated and withheld the machine from the plaintiff. The recovery of the expense of constructing the second one as damage for the detention of the other was sustained, although, by reason (as it turned out) of its insufficiency, the value of the latter was much less than such cost. In the present case the action is founded solely upon the failure to deliver to the plaintiff the stock without any supported claim of special circumstances for any damages other than such as flow naturally and reasonably from such default of Brown and Seligman. While the performance of their contract in that respect may have required them to pay to the company $200,000, the entire value of its performance to the plaintiff was in the stock which they undertook to deliver to him, and this was the only benefit he was entitled to take under that provision of the contract. The value of the stock or its pecuniary equivalent was the measure of his injury by the default; and, as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only.

There was no error in the ruling of the referee by which evidence of value of the stock was received. The complaint alleged that on January 22, 1873, when the plaintiff accepted the certificate before mentioned of stock in performance of the contract, the stock of the company was worth and salable in the market at its full par or face value, and demanded judgment for that amount and interest from January 23, 1873. This was the situation of the complaint when the evidence upon the question of value was given; and the plaintiff, upon a state of facts embraced in an hypothetical question, called upon the witnesses to state the value of the stock in January, 1873. This was the time when, by the issue tendered in the complaint and taken by the answer, the value of the stock was by the pleadings brought in question; and it may be observed that the assumed facts upon which the answers of the witnesses were predicated were the same, and no different at that time than they were on the day when the contract matured.

These views lead to the conclusion that, as to the defendant Brown, the judgment directed by the referee should be sustained. But, as the order granting an additional allowance of costs to that defendant may be deemed to have been reversed at general term, that disposition of the order is affirmed, and the costs recovered treated as reduced accordingly. The contract was the joint undertaking of Brown and Seligman. The latter having died before the action was commenced, his personal representatives were joined as defendants with Brown. The complaint was as to those executors dismissed by the referee, upon the ground that facts sufficient to constitute a cause of action against them were not alleged. Their testator having only the relation of joint contractor with Brown, his death placed the primary liability upon the latter, unless he was unable to pay or insolvent. Upon that fact the liability of those personal representatives to the plaintiff upon the contract was dependent, and that fact was essential to the cause of action against them. Grant v. Shurter, 1 Wend. 148; Trustees v. Lawrence, 11 Paige, 80, 2 Denio, 577; Pope v. Cole, 55 N. Y. 124, and cases there cited; Hauck v. Craighead, 67 N. Y. 432. It was not alleged. This defect was available by objection which was taken at the trial. Code, § 499.

It does not appear on what ground the motion to amend the complaint was denied. The plaintiff was not entitled to it as matter of right; and the discretionary power of the referee exercised in denying the amendment is not the subject of review here. The judgment in favor of the defendants, Seligman, as modified by the general term, should be affirmed; and the order reversing the judgment, and granting a new trial as against defendant Brown, should be reversed, and the judgment entered upon the report of the referee (after deducting therefrom the amount of the additional allowance of costs) affirmed. All concur.

Judgment accordingly.

BEEMAN v. BANTA.

(23 N. E. 887, 118 N. Y. 538.)

Court of Appeals of New York. Second Division. Feb. 25, 1890.

Appeal from supreme court, general term, fourth department.

Action by Marcus M. Beeman against George A. Banta. There was a verdict and judgment for plaintiff, which was affirmed by the general term, and defendant again appeals.

Rhodes, Coons & Higgins and John H. Parsons, for appellant. Baldwin & Kennedy, for respondent.

PARKER, J. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiff as that chickens could be kept therein in perfect condition. The jury have found the making of the warranty, its breach, and the amount of damages resulting therefrom. The general term have affirmed these findings, and, as there is some evidence to support each proposition, we have but to consider the exceptions taken. The appellant excepted to the charge of the court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect, and make it conform to the warranty. And Milk Pan Co. v. Remington, 109 N. Y. 143, 16 N. E. Rep. 48, is cited in support of such contention. That decision was not intended to, nor does it, modify the rule as recognized and enforced in Passinger v. Thorburn, 34 N. Y. 634; White v. Miller, 71 N. Y. 133; Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. Rep. 264; Reed v. McConnell, 101 N. Y. 270, 4 N. E. Rep. 718; and kindred cases. In that case the argument of the court demonstrates—*First*, that improper evidence was received; and, *second*, that the finding of the referee was without evidence to support it. No other proposition was decided, and the discussion is not applicable to the facts before us. The plaintiff was largely engaged in preparing poultry for market, which he had either raised or purchased. Before meeting the defendant, he had attempted to keep chickens for the early spring market in a freezer or cooler which he had constructed for the purpose. The attempt was unsuccessful, and resulted in a loss. The jury have found, in effect, that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly represented and warranted that for about $500 he would construct a freezer which should keep them in perfect condition for such market; that he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens. The court charged the jury that, if they should find for the plaintiff, he was entitled to recover as one of the elements of damage the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens. The fact that the defendant well knew the use to which the freezer was to be immediately put, and his representation and warranty that it would keep chickens in perfect condition, burden him with the damage sustained because of his failure to make good the warranty. Upon that question the court instructed the jury that the plaintiff was entitled to recover the value of the chickens, less cost of getting them to market, including freight and fees of commission merchant. The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth 40 cents a pound in the market during the month of May. Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit which the plaintiff was contracting to secure, and, in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented, as well as losses sustained, are proper elements of damage. Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. Rep. 264. We have carefully examined the other exceptions to the charge as made, and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal. The insistence of the appellant that the judgment be reversed, because against the weight of evidence, may have been entitled to some consideration by the general term, but it cannot be regarded here. The judgment should be affirmed. All concur, except FOLLETT, C. J., and VANN, J., not sitting.

Judgment affirmed.

SHAW et al. v. SMITH et al.

SHAW v. JONES.

(25 Pac. 886, 887, 45 Kan. 334.)

Supreme Court of Kansas. Feb. 7, 1891.

Error from district court, Cowley county; M. G. TROUP, Judge.

Samuel Dalton and Samuel J. Day, for plaintiffs in error. S. E. Fink, for defendants in error.

VALENTINE, J. This was an action brought before a justice of the peace of Cowley county on January 31, 1887, by G. B. Shaw & Co. against Yates Smith and James W. McClellen, for the recovery of $12, and interest, upon the following instrument in writing, to-wit: "Cambridge, April 30, 1886. On or before the first day of October, 1886, we promise to pay to the order of G. B. Shaw & Co., at their office in Cambridge, twelve dollars, for value received, with interest after maturity, at the rate of ten per cent. per annum until paid. This note is given in part consideration of the sale to Y. Smith of eight bushels flaxseed, by said G. B. Shaw & Co.; and, as a further consideration therefor, we agree to plant 14 acres with said seed, to cultivate, harvest, and clean the same in proper and careful manner, and deliver to G. B. Shaw & Co. at Cambridge, Kansas, on or before the 1st day of December, 1886, the whole crop raised therefrom, at a price mentioned below, per bushel of 56 lbs., for pure and prime flaxseed; flaxseed not pure and prime to be inspected and graded subject to the rules of the St. Louis Merchants' Exchange. And should we sell or trade, or attempt to offer to sell or trade, such crop to any other person or persons than said G. B. Shaw & Co., or order, then the note hereto attached shall immediately become due and payable; and the said G. B. Shaw & Co., or their assigns, are hereby authorized to enter any building or premises without any legal process whatever, and seize and remove such crop whatsoever (and in whosesoever possession the same may be found), and to pay me the balance on demand, after the amount due upon said note has been deducted, together with all costs and expense incurred, where seizure is necessary; price to be paid per bushel, on basis of pure, to be 35 cents less than St. Louis market price on day of delivery. YATES SMITH. JAMES W. MCCLELLEN." Afterwards the case was taken on appeal to the district court, where the case was tried before the court and a jury, with the result hereafter stated. The plaintiffs' bill of particulars simply set up the foregoing instrument, and asked judgment thereon for $12, and interest at the rate of 10 per cent. per annum from October 1, 1886. The defendants' amended answer thereto and cross-petition alleged that the flaxseed for which the instrument sued on was given was purchased by Smith, for the purpose of sowing it and raising a crop; that it was warranted by the plaintiffs to be good, but that it was worthless; that he (Smith) sowed it, but that it did not germinate; and that he lost his time, labor, and use of his ground; and that he was damaged thereby in the sum of $150. And he asked judgment for that amount, and costs of suit. The trial resulted in a verdict in favor of the defendants and against the plaintiffs for the sum of $90, and judgment was rendered accordingly; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears from the evidence that the facts of the case are substantially as follows: The plaintiffs, G. B. Shaw & Co., were dealers in flaxseed at Cambridge, in said Cowley county. Smith went to their place of business about April 20, 1886, and found Joseph Fraley, their agent, in charge. Shaw & Co. did not have any flaxseed on hand, but they were about to order some. Smith told Fraley to order eight bushels for him, for the purpose of sowing it and raising a crop. Fraley told Smith that they would furnish the flaxseed upon the conditions substantially as set forth in the foregoing instrument. Afterwards the flaxseed arrived, and Fraley gave notice to Smith. Smith then, on April 30, 1886, went to Cambridge and received the seed, about 8 bushels in amount, inclosed in sacks, from Fraley, and took it home and sowed it upon about 12 acres of ground. The seed appeared to be good, and Fraley and Smith believed it to be good, but in fact it was not good, and it did not germinate; and Smith lost all his time and labor in procuring it, and in preparing the ground for sowing it, and in sowing it, and he got no crop, and lost the use of his ground. And upon these facts the jury found in favor of the defendants and against the plaintiffs, and assessed the defendants' damages at $90, as aforesaid. The only questions now involved in the case are as follows: (1) Under the contract between the parties, and under the circumstances of the case, was there any such implied warranty on the part of Shaw & Co., respecting the sufficiency of the flaxseed for the purposes of sowing it and raising a crop, that the plaintiffs may be defeated in their action on the aforesaid written instrument? (2) If so, then under such contract and warranty and circumstances, may the defendants, Smith and McClellen, or rather Smith, recover damages for Smith's losses, necessarily occasioned by reason of the worthlessness of the flaxseed? (3) And, if so, then what is the measure of Smith's damages? The maxim of the common law, *caveat emptor*, is the general rule applicable to purchasers and sales of personal property so far as the quality of the property is concerned; and, under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, was there any implied warranty? At the time when the contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and, when it arrived and was delivered to him, the defect in the seed was not apparent, and was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed, and when it failed to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field, and of raising a crop from it; and therefore this purpose was a part of the contract, and demanded that the seed should be sufficient for such purpose. It, in effect, constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller, in effect, agreed that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterwards, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about 10 days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop, and afterwards the purchaser was to sell, and the seller was to buy, the crop, upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed should be sufficient for the purpose for which it was bought and sold. Wolcott v. Mount, 36 N. J. Law, 262, 38 N. J. Law, 496; Van Wyck v. Allen, 69 N. Y. 61; White v. Miller, 7 Hun, 427, 71 N. Y. 118; Whitaker v. McCormick, 6 Mo. App. 114. We also think that the purchaser may recover damages from the seller for all the losses necessarily sustained by the purchaser, by reason of the worthlessness of the flaxseed furnished by the seller. See the authorities above cited, and also the following: Passinger v. Thorburn, 34 N. Y. 634; Flick v. Wetherbee, 20 Wis. 392; Ferris v. Comstock, 33 Conn. 513; Randall v. Raper, El., Bl. & El. 84. And it is not claimed that the purchaser in the present case recovered for more than the foregoing losses. The claim is that the purchaser had no right to recover at all, and that the seller had the right to recover on the instrument sued on. No other questions are presented. We think no material error was committed in the case, and the judgment of the court below will be affirmed. All the justices concurring.

PER CURIAM. It is understood that the same questions of law and fact are involved in the case of G. B. Shaw & Co. v. T. L. Jones, from Cowley district court, that are involved in the case of Shaw v. Smith, just decided, and the judgment of the court below in this case will be affirmed upon the authority of that case.

See 32 A L R. 1215
and 193 Cal 62

SHAWHAN v. VAN NEST.

(25 Ohio St. 490.)

Supreme Court of Ohio. December Term, 1874.

Motion for leave to file a petition in error.

Action by Peter Van Nest against Reasin W. Shawhan to recover on a contract by which he agreed to make for Shawhan a carriage in accordance with his directions for $700, and have the same ready for delivery at his shop October 1, 1871, in consideration whereof Shawhan agreed to accept the carriage at the shop and pay the agreed price. He alleged the tender of the carriage October 1st, and the refusal of Shawhan to accept or pay for it. The evidence established the allegations of the complaint. The court instructed the jury that, if they found the issues for the plaintiff, they should give him a verdict for the contract price of the carriage, with interest from the time the money should have been paid. Shawhan requested the court to give to the jury the following special instructions: (1) "If, in this case, the evidence shows that the defendant ordered the plaintiff to make for him a carriage, and agreed to take or receive it, when finished, at the plaintiff's shop, and to pay a reasonable price therefor, and the plaintiff did, in pursuance of such order and agreement, make such carriage, of the value of seven hundred dollars, and have the same in readiness for delivery at his shop, of which the defendant had notice, and the defendant then failed, neglected, and refused to take, receive, or pay for said carriage, though requested so to do by the plaintiff, these will not authorize you to render a verdict for the plaintiff for the price or value of the carriage." (2) "If the plaintiff has proved the making of the carriage for the defendant, and the refusal of the latter to receive and pay for it, as alleged in the petition, then he can only recover for the damages or losses he has actually sustained by reason of this refusal of the defendant, which is the difference between the agreed price and the actual value." These instructions the court refused to give, and Shawhan excepted. The jury found for Van Nest, and gave him the contract price of the carriage, with interest.

W. P. Noble, for plaintiff in error. G. E. Seney, for defendant in error.

GILMORE, J. The only question to be determined in this case is: Did the court err in refusing to give to the jury the special instructions requested by the defendant on the trial below? The authorities cited by counsel for the parties respectively, are not in harmony with each other on this question. Some of those cited by the plaintiff in error (defendant below) show clearly that under the pleadings and practice at common law, there could be no recovery under the common counts in assumpsit, for goods sold and delivered, or for goods bargained and sold, where no delivery sufficient to pass the title from the vendor to the vendee had been made. And further, that in this form of action, proof of a tender of the goods by the vendor to the vendee, or leaving them with him against his remonstrance, would not constitute such a delivery as would pass the title and enable the vendor to recover. While these may be regarded as settling the rules of pleading and evidence on the trial of particular cases, and therefore not decisive of the question when raised under issues so formed as to present it freed from the technicalities of pleading, still there are other cases cited on the same side, which declare the rule to be as follows: Where an action is brought by the vendor against the vendee, for refusing to receive and pay for goods purchased, the measure of damages is the actual loss sustained by the vendor in consequence of the vendee refusing to take and pay for the goods, or, in other words, the difference between the contract price and the market price at the time and place of delivery. In the authorities cited by the plaintiff in error, no distinction is drawn, or attempted to be drawn, between the sale of goods and chattels already in existence, and an agreement to furnish materials and manufacture a specific article in a particular way, and according to order, which is not yet in existence; the theory being, that in neither case would the title pass, or property vest in the purchaser, until there had been an actual delivery, and that until the title had passed, the vendor's remedy was limited to the damages he had suffered by reason of the breach of the contract by the vendee, which were to be measured by the rule above stated. In this case it is not necessary to determine whether or not a distinction, resting upon principles of law, can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee. The case here is of the latter kind, and the question is, whether the plaintiff below was entitled to recover the contract price of the carriage, on proving that he had furnished the materials, and made and tendered it in pursuance of the terms of the contract.

Counsel for the defendant in error (plaintiff below) has cited a number of authorities, in which the questions presented and decided arose upon facts similar to those in this case, and upon issues presenting the question in the same way; and as the conclusions we have arrived at, are based upon this class of authorities, some of them may be particularly noticed.

In Bement v. Smith, 15 Wend. 493, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, for which he promised to pay eighty dollars. The plaintiff made the sulky according to contract, and took it to the residence of the defendant, and told him he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant refused to receive it. Whereupon the plaintiff told him he would leave it with Mr. De Wolf, who lived near; which he did, and commenced suit. On the trial it was proved the sulky was worth eighty dollars, the contract price. The court charged the jury, that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the court to charge the jury that the measure of damages was not the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc. The judge declined to so charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with eighty-three dollars and twenty-six cents damages, being the contract price with interest. The charge to the jury was sustained by the supreme court of New York.

In Ballentine et al. v. Robinson et al., 46 Penn. St. 177, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs were to provide materials, and construct for the defendants a six-inch steam-engine, with boiler and Gifford injector and heater, in consideration whereof the defendants were to pay plaintiffs five hundred and thirty-five dollars in cash on the completion thereof. The plaintiffs complied with and completed the contract in all respects on their part, but the defendants refused to pay according to contract. On the trial, the plaintiffs proved the contract, and the performance of it on their part, and that the engine was still in their hands.

The defendants' counsel asked the court to instruct the jury "that the proper measure of damages in this case is the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken." The court declined to charge as requested, and instructed the jury that the measure of damages was the contract price of the engine, with interest. There was a verdict for the plaintiffs for the contract price. The case was taken to the supreme court, and the error assigned was the refusal of the court to give the instructions requested by the defendant.

The supreme court affirmed the judgment in the case below. It will be seen that these cases are very similar, and presented the same question, and in the same manner that the question is presented in this case. Graham v. Jackson, 14 East, 498, decides the point in the same way. Mr. Sedgwick, in his work on Damages, side page 280, in speaking on this subject, says: "Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement; but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them, if he sees fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price. But if the vendor does not pursue this course, and, without reselling the goods, sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full."

In Hadly v. Pugh et al., Wright, 554, the action was "assumpsit on a written agreement between the parties, for the defendants to take all the salt the plaintiff manufactured between the 2d of June, 1831, and the 1st of January, 1832, to be delivered at the landing in Cincinnati, from time to time, as the navigation of the Muskingum and Ohio should permit, and to pay forty-five cents a bushel." The plaintiff proved the agreement, and the offer to deliver to the defendants three hundred and fifty barrels of salt, which the defendants refused to receive. There was an issue in the case, as to whether the contract had been previously fulfilled and abandoned by the parties. The court (Lane, J.) charged the jury that if the contract had not been "fulfilled or abandoned, and the plaintiff tendered the salt under the contract, which was refused, he had a right to leave it for the defendants and recover the value."

The only case I have examined in which the authorities on this point are reviewed, is that of Gordon v. Norris, 49 N. H. 376. The case is too lengthy and complicated to attempt to give an abstract of it here, but the point under consideration was involved; and although the learned judge criticises the law as laid down by Mr. Sedgwick, and even shows that the authorities he quotes in support of his position do not sustain him, for the reason pointed out, yet he says that there is a distinction between the case of Bement v. Smith, and the ordinary cases of goods sold and delivered—viz., "the distinction between a contract to sell goods then in existence, and an agreement to furnish materials and manufacture an article in a particular way and according to order, which is not yet in existence." He recognizes Bement's Case and others of the same class as exceptions to the general rule which is to be applied in the sale of ordinary goods and merchandise which have a fixed market value; and in the syllabus of the case, the distinction is kept up and stated as follows:

"When the vendee refuses to receive and pay for ordinary goods, wares, and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price for the goods, but the difference between the contract price and the market price or value of the same goods at the time when the contract was broken.

"But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a particular use or purpose—when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages, in an action against the vendee for breach of the contract, the full contract price of the manufactured article."

As has been said, we are not called upon now to determine whether the distinction as drawn in the clauses quoted, is sound on principle or not; but be that as it may, we recognize the law applicable to the case before us as being correctly stated in the clause last quoted.

Judge Swan, in his excellent "Treatise," (10th ed. 780), in speaking of the effects of a tender upon the rights of the buyer and seller, and of the damages in such case, says. "The general rule in relation to the rights of a seller, under a contract of sale, where he has tendered the property, and the buyer refuses to receive it, is this: The seller may leave the property at some secure place, at or near the place where the tender ought to be and is made, and recover the contract price; or he may keep it at the buyer's risk, using reasonable diligence to preserve it, and recover the contract price and expenses of preserving and keeping it; or he may sell it, and recover from the buyer the difference between the contract price and the price at which it fairly sold." The rule as thus laid down was first published in 1836, two years after the decision in Hadly's Case, above referred to, which was substantially followed by Judge Swan in laying it down. It does not appear that either the decision or the rule as laid down has ever been questioned in Ohio. It will be perceived that Judge Swan lays down the rule generally as applicable to all sales of chattels in the ordinary course of trade, without intimating any such distinction as that drawn in Gordon v. Norris. We sanction and apply the rule in the determination of the particular case before us. When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he can not be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between the contract price and what it sold for.

The court below did not err in refusing to give to the jury the special instructions requested by the defendant below.

Motion overruled.

McILVAINE, C. J., and WELCH, WHITE, and REX, JJ., concurred.

KADISH et al. v. YOUNG et al.[1]

(108 Ill. 170.)

Supreme Court of Illinois. Nov. 20, 1883.

Appeal from appellate court, First district. This was an action of assumpsit, by A. N. Young and George Bullen against L. J. Kadish and Charles Fleischman. Judgment for plaintiffs for $20,000. Defendants appeal. Affirmed.

John Woodbridge and Mr. Francis Lackner, for appellant Kadish. Hoadley, Johnson & Colson, for appellant Fleischman. William A. Montgomery, for appellees.

SCHOLFIELD, J. This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention.

* * * * * * * *

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught v. Dodson, 49 Ill. 446; Larrabee v. Badger, 45 Ill. 440, and Saladin v. Mitchell, Id. 79), and is not contested by appellant's counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell, (where the property is in the possession of the seller at the time,) at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer can not thus create a breach of contract upon which the seller is bound to act. In Leigh v. Paterson, 8 Taunt. 540, Phillpotts v. Evans, 5 Mees. & W. 475, Ripley v. McClure, 4 Exch. 359, and, it may be, also in other early cases, it was held a party to a contract to be performed in the future can not, by merely giving notice to the opposite party that he will not perform his part of the contract, create a breach of the contract. Subsequently, however, in Cort v. Railway Co., 6 Eng. Law & Eq. 230, and more explicitly in Hochster v. De Latour, 20 Eng. Law & Eq. 157, the doctrine was announced as not in conflict with previous decisions, that the party to whom notice is given in such cases will be justified in acting upon the notice, provided it is not withdrawn before he acts. Lord Campbell, C. J., in delivering his opinion in the latter case, and speaking for the court, used this language: "The man who wrongfully renounces a contract into which he has deliberately entered, can not justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and can not be prejudicial to the wrong-doer."

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[1] Portion of opinion omitted.

The leading text-writers who treat of this question follow the authority of these cases, and the rule they announce is thus expressed in Sedg. Meas. Dam. (6th Ed.) 340, *284: "An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance by giving notice that he would not be ready to complete the agreement, and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts have justly denied the right of either party to rescind the agreement, and have adhered to the day of the breach as the period for estimating damages." To like effect, see Chit. Cont. (11th Am. Ed.) 1079; 2 Pars. Cont. (6th Ed.) 676; Benj. Sales (1st Ed.) 559; Id. (4th Am. Ed.) 973; Add. Cont. *952; Wood, Mayne, Dam. 250, *150.

The question came before this court in Fox v. Kitton, 19 Ill. 519, whether, when a party agrees to do an act at a future day, and before the day arrives he declares he will not keep his contract or do the act, the other party may act on such declaration, and bring an action before the day arrives; and it was held, on the authority of Phillpotts v. Evans, and Hochster v. De Latour, supra, that he may; and in that case it is said, in the opinion of the court, that there is no conflict in the cases referred to by counsel in the discussion thereof, and to prove it, this language from the opinion of Parke, Baron, in Phillpotts v. Evans, is quoted: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." And it is then added: "This is in strict accordance with the principles recognized in the leading case relied on by the plaintiff.—Hochster v. De Latour."

In McPherson v. Walker, 40 Ill. 371, the question before the court was, whether it was error to say in an instruction that where there is a contract for the sale of property to be delivered in the future, a tender or offer of the property by the seller on the day of delivery is excused by a previous notice of the buyer that he would not accept the property, and it was held that it was. In the opinion of the court it is said: "The rule is, if one bound to perform a future act, before the time for doing it declares his intention not to do it, this, of itself, is no breach of his contract; but if this declaration be not withdrawn, when the time arrives for the act to be done it constitutes a sufficient excuse for the default of the other party,"—referring to 2 Pars. Cont. 188, Hochster v. De Latour, supra, and Crist v. Armour, 34 Barb. 378.

In Chamber of Commerce v. Sollitt, 43 Ill. 519, the character of question is the same as in the two preceding cases to which we have just referred, and it was decided the same way. Cort v. Railway Co., supra, Hochster v. De Latour, supra, and Fox v. Kitton, supra, are referred to as sustaining the decision.

In Cummings v. Tilton, 44 Ill. 173, one of the points decided was, if the party who is to receive informs the party who is to deliver that he can not pay the money, the latter is excused from offering to deliver,—but there is no discussion of the question.

Follansbee v. Adams, 86 Ill. 13, involved the same question as that decided in Fox v. Kitton, supra, and on the authority of that case, and Chamber of Commerce v. Sollitt, supra, it was decided the same way.

While it is true in none of these cases was the question whether one party to a contract may, by only a notice of his intention not to comply with its terms, create a breach of the contract, before the court, still, in all of them it is assumed that he can not, for if he could, the questions they decide would have been immaterial, and the English cases which they profess to follow, as has been seen, expressly hold that he can not.

But counsel insist this court has held the contrary in Gale v. Dean, 20 Ill. 320, and in Trustees v. Shaffer, 63 Ill. 244. This is a misapprehension. Neither case professes to discuss the question before us, and no notice is taken in either of the decisions or dicta to which we have above referred. In Gale v. Dean no time was fixed by the terms of the contract for its performance, and in view of this omission the court held it reasonable that after the lapse of a reasonable time either party might declare a breach of the contract, if not performed; and it was in reference to this omission and these reciprocal rights of the parties under the contract, solely, that the court used the language quoted and relied upon by counsel for appellants, namely, that "we do not think that Gale, when he found he could not perform, was absolutely at the mercy of Dean for the determination of the time when his liability should be fixed and the measure of that liability determined." It had not the slightest reference to the character of question now before us. In the other case, Trustees v. Shaffer, the time for the performance of the contract had arrived. There was no question in that respect. If the plaintiff was improperly discharged, there was a clear breach of the contract. There was no controversy in regard to the question whether one party to a contract to be performed in the future, can, by a mere notice in advance of the time of performance that he does not intend to perform, create a breach of the contract; nor was there any question as to what acts a party may be required to do in advance of a breach of contract to mitigate the damages of the adverse party, because of notice that there would be a breach by him. After breach of a contract, as before herein intimated, we do not, at present, question that it is the duty of the party entitled to damages to do what he reasonably may, without prejudice to his rights, to lighten the burden falling on his adversary.

There is nothing in the more recent English cases, as we understand them, repugnant to those to which we have referred upon this question.

In Frost v. Knight, L. R. 7 Exch. 111, 1 Moak, Eng. R. 218, decided in the exchequer chamber in February, 1872, the suit was for breach of a marriage contract, whereby the defendant had promised to marry the plaintiff upon the death of his father, but the father still living, the defendant had announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. Cockburn, C. J., in delivering the opinion of the court, thus states the law, after referring to the previous decisions: "The promisee, if he pleases, may treat the notice of intention [i. e., not to perform the contract] as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the proper time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his loss." This was followed, and its doctrine reiterated, in Brown v. Muller, L. R. 7 Exch. 319, 3 Moak, Eng. R. 429, decided in the court of exchequer in June, 1872, and Roper v. Johnson, L. R. 8 C. P. 167, 4 Moak, Eng. R. 397, decided in the common pleas in February, 1873.

Counsel for appellants refer to the fact that Keating, J., in Roper v. Johnson, says: "If there had been any fall in the market, or any other circumstances calculated to diminish the loss, it would be for defendant to show it,"—and then cites with approval from the opinion of Cockburn, C. J., in Frost v. Knight, supra, to the effect that "the damages are subject to abatement in respect of any circumstances which would entitle him to a mitigation," etc., and insist they recognize the duty, here, of appellees, upon receiving notice, etc., to have sold upon the market or have entered into another contract for January delivery, etc. It is enough to observe in answer to this, that in both Frost v. Knight and Roper v. Johnson, supra, the notice that defendant would not comply with the contract was accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declarations of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose, for, as we have seen, the theory in such case, as laid down by Cockburn, C. J., in Frost v. Knight, supra, is: "He keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to Dillon v. Anderson, 43 N. Y. 232, Danforth v. Walker, 37 Vt. 240, and same case again in 40 Vt. 357, and Collins v. Delaporte, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In Dillon v. Anderson, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In Danforth v. Walker, 37 and 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them, and as soon as he could get them away, some time during the winter. Soon after the first car load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden can not afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 Suth. Dam. 361.

The points in issue in Collins v. Delaporte, are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of Danforth v. Walker, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it, as it was said in Frost v. Knight, supra, the defendant was, in case of notice, not to perform a contract the time of the performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind,—in those there was. That it was not intended, by these cases, to trench upon the doctrine of Leigh v. Paterson, Phillpotts v. Evans, and other cases of like character, is manifest from the fact that they make no reference to those cases, or to the rule they announce; and in Collins v. Delaporte, no reference is made to Daniels v. Newton, reported in the next preceding volume, 114 Mass. 530, wherein that court refused to follow the modification made in Hochster v. De Latour, and Frost v. Knight, of the rule recognized by the preceding English decisions, but held that an action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, can not be maintained by proof of an absolute refusal, on the defendant's part, ever to purchase. It follows that, in our opinion, the ruling on the point in question was free of substantial objection.

* * * * * * *

Judgment affirmed.

HOSMER et al. v. WILSON.

(7 Mich. 294.)

Supreme Court of Michigan. Oct. 17, 1859.

Assumpsit by John B. Wilson against Rufus Hosmer and another "for work and labour done, and services rendered, and materials furnished, by plaintiff and his servants for defendants, all at request of said defendants." Judgment for plaintiff, and defendants bring error. Reversed.

It appeared that one of defendants had called at plaintiff's foundry, and there signed a written order for an engine, to be paid for when taken out of the shop, and that plaintiff's clerk accepted the order; that plaintiff then proceeded to make such engine, and only stopped when he received a letter from defendants countermanding the order.

Jerome & Swift, for plaintiffs in error. Towle, Hunt & Newberry, for defendant in error.

CHRISTIANCY, J. Whether the written memorandum signed by the defendants below, when taken in connection with the whole transaction between the parties, was understood by all of them as a contract, might have been a fair question of fact for the jury. But admitting the contract to have been proved in all respects as claimed by the plaintiff, and that defendants below wrongfully countermanded the order for the engine, after the plaintiff had, in good faith, made most of the castings, and done a large part of the work; the first question which arises is, whether the plaintiff was entitled to recover upon the common counts for work and labor, as upon a quantum meruit? As to the materials it is admitted he could not, though contained in the same count; as they still belonged to plaintiff, and were never delivered to defendants.

In the case of a contract for a certain amount of labor, or for work for a specified period—when the labor is to be performed on the materials or property, or in carrying on the business, of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay as he has agreed (when payments become due in the progress of the work), or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed: Hall v. Rupley, 10 Barr, 231; Moulton v. Trask, 9 Metc., 579; Derby v. Johnson, 21 Vt., 21; Canada v. Canada, 6 Cush., 15; Draper v. Randolph, 4 Harrington, 454; Webster v. Enfield, 5 Gilm., 298.

And in such cases he may, it would seem, under the common indebitatus count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or whether it can be so apportioned or not, he may under the quantum meruit recover what it is reasonably worth. But in all such cases, the defendant, having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed. This duty the law enforces under the fiction of an implied contract, growing out of the reception or appropriation of the plaintiff's labor.

It is therefore evident, 1st, that in all the cases supposed, an implied contract would have arisen, and the plaintiff might have recovered upon a quantum meruit, if no special contract had ever been made; 2d, that in the like cases (where the value of the work done could not, as it probably could not in the case before us, be apportioned by the contract price) the value or fair price of the work done, would necessarily constitute the true measure of damages. And in all such cases, as first supposed, either the contract price, or the reasonable worth of the labor done, would measure the damages.

Similar considerations and like rules would, doubtless, equally apply to contracts for furnishing materials, and for the sale and delivery of personal property, when, after part of the materials or property has been received and appropriated by, or vested in the defendant, he has prevented the plaintiff from performing, or authorizing him to treat the contract as at an end, on any of the grounds above mentioned.

But the case before us stands upon very different grounds. Here the contract, as claimed to have been proved, was in no just sense a contract for work and labor, nor could the plaintiff, while at work upon the engine, be properly said to be engaged in the business of the defendants. It was substantially a contract for the sale of an engine, to be made and furnished by the plaintiff, to the defendants, from the shop, and, of course, from the materials of the plaintiff. The defendants had no interest in the materials, nor any concern with the amount of the labor. They were to pay a certain price for the engine when completed. Engines, it is true, are not constructed without labor; the labor, therefore, constitutes part of the value of the engine. But this would have been equally true if the contract in this case had been for an engine already completed.

The labor of the plaintiff was upon his own materials, to increase their value, for the purpose of effecting a sale to defendants when completed. No title in any part of the materials was to vest in defendants till the whole should be completed by plaintiff, and delivered to defendants. The plaintiff might have sold any of the materials, after the work was performed, or the whole engine when completed, at any time before delivery to, or acceptance by defendants.

Whether, therefore, the labor actually performed on these materials, when the defendants refused to go on with the contract, or prevented the further performance, had enhanced or diminished the value of the materials, and how much, would be a necessary question of fact, in arriving at any proper measure of damages. The value of the work and labor does not, therefore, in such a case, constitute the proper criterion or measure of damages. If the value of the materials has been enhanced by the labor, the plaintiff, still owning the materials, has already received compensation to the extent of the increased value; and to give him damages to the full value of the labor, would give him more than a compensation. If the value of the materials has been diminished, the value of the labor would not make the compensation adequate to the loss. It would be only in the single case where the materials have neither been increased nor diminished by the labor, that the value of the labor would measure the damages. Such a case could seldom occur, and whether it could or not, it must always be a question of fact in the case, whether the value of the materials does remain the same, or whether it has been increased, or diminished, and to what extent.

Again, as the defendants never received the engine, nor any of the materials, the title and possession still remained in the plaintiff, and the defendants never having received or appropriated the labor of the plaintiff, if the same work had been performed under the like circumstances, without any actual or special contract, the law would have imposed no duty upon the defendants, and therefore implies no contract on their part to pay for the work done: 1 Chit. Pl., 382; Atkinson v. Bell, 8 B. & C., 277; Allen v. Jarvis, 20 Conn., 38.

The only contract, therefore, upon which the plaintiff can rely to pay him for the labor, is the special contract. No duty is imposed upon the defendants otherwise than by this. This contract, therefore, must form the basis of the plaintiff's action. He must declare upon it, and claim his damages for the breach of it, or for being wrongfully prevented from performing it. His damages will then be the actual damages which he has suffered from the refusal of the defendants to accept the articles, or in consequence of being prevented from its performance; and these damages may be more or less than the value of the labor. This case, therefore, in this respect, comes directly within the principle recognized in the case of Atkinson v. Bell, above cited, and in Allen v. Jarvis, 20 Conn., 38 (a well reasoned case, which we entirely approve). And see Moody v. Brown, 34 Me., 107, where the same principle is recognized.

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed, and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine, when it should be completed, was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light, as repects the plaintiff's remedy, as an absolute, physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort v. Ambergate Railway Co., 6 E. L. & Eq., 230; Derby v. Johnson, 21 Vt., 21; Clarke v. Marsiglia, 1 Denio, 317; Hochster v. De Latour, 20 E. L. & Eq., 157. In the latter case, it was held that a refusal of the employer before the work commenced, to allow it to be done, authorized an immediate action upon the contract.

So, a refusal to make any payment, which, by the contract, is to be made during the progress of the work, has the same effect: Draper v. Randolph, above cited; and see Hoagland v. Moore, 2 Blackf., 167; Webster v. Enfield, 5 Gilm., 298; Withers v. Reynolds, 2 B. & Ad., 882. See this whole subject ably discussed, and the authorities cited, in 2 Smith's Lead. Cas. (Amer. Edit.), 22 to 38; and for what will amount to prevention, see note of Hare & Wallace to same, 40. As to mode of declaring on the contract: Ibid., 41, and 1 Chit. Pl., 326.

It would be unreasonable and unjust to hold that the plaintiff, in this case, after the positive countermand of the defendants' order, was, nevertheless, bound to go on and complete the engine, and thereby increase the damages, before he could recover for the work already done. The defendants cannot complain that the plaintiff has given credit to their assertion. The law will not require a vain thing. And it is certainly, in such cases, much better for both parties to hold the party thus notified to be fully justified in stopping the work, as it lessens the damages the other party has to pay, and relieves the party who has to do the work from expending further labor, for which he has fair notice he is to expect no payment. And it is certainly very questionable whether the party thus notified has a right to go on after such notice, to increase the amount of his own damages. In Clarke v. Marsiglia, above cited, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract, and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, above cited. This would seem to be good sense, and, therefore, sound law. And it would seem that any other rule must tend to the injury, and, in many cases, to the ruin of all parties.

It is unnecessary here to review the authorities cited by the plaintiff's counsel. Most, if not all of them, when carefully examined, will be found entirely in harmony with the views above expressed. The result of them will be found well and fairly stated, and evidently form a careful examination, in Allen v. Jarvis, above cited. I have made the same examination, and come to the same result.

It may, however, be proper here to say, that in the case of Planche v. Colburn, 8

Bing., 14, upon which much reliance was placed by the counsel for the defendant in error, there was a special count upon the contract, as well as the common counts, and it may be inferred from the opinion that the plaintiff was allowed to retain his verdict upon the special count. And we have the high authority of Lord Campbell that such was the case. See Hochster v. De Latour, 20 E. L. & Eq. 163, above cited. As the conclusion at which we have arrived upon this point disposes of the whole case, it becomes unnecessary, and even improper to discuss the other questions raised in the case.

And, as we do not conceive that under a writ of error we have any power to amend the declaration in this respect, the judgment must be reversed.

The other justices concurred.

HINCKLEY v. PITTSBURGH BESSEMER STEEL CO., Limited.[1]

(7 Sup. Ct. 875, 121 U. S. 264.)

Supreme Court of the United States. April 18, 1887.

In error to the circuit court of the United States for the Northern district of Illinois.

Thos. S. McClelland, for plaintiff in error. John N. Jewett, for defendant in error.

BLATCHFORD, J. This is an action at law, brought in the circuit court of the United States for the Northern district of Illinois, by the Pittsburgh Bessemer Steel Company, Limited, a Pennsylvania corporation, against Francis E. Hinckley, to recover damages for the breach by Hinckley of a written contract for the purchase by him from the company of 6,000 tons of steel rails. The contract was as follows:

"Memorandum of Sale.

"The Pittsburgh Bessemer Steel Company, Limited, have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn St., Chicago, Ills., and the said Hinckley has purchased and agrees to pay for, six thousand gross tons of first-quality steel rails, to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company, Limited, pattern No. 5. Said rails are to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed. At least ninety per cent. shall be in thirty (30) feet lengths, with not over ten (10) per cent. of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet. All second-quality rails, or excess of shorts which may be made, not exceeding five (5) per cent. of each month's shipments to be taken at the usual reduction of ten (10) per cent. in price, and to be piled and shipped separately, (painted white on both ends,) as may be ordered by the inspector. Deliveries to begin in May, 1882, in which month one thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1, 1882, until finished, strikes and accidents beyond ordinary control of said steel company, and acts of Providence, preventing or suspending deliveries, alone excepted, in which case deliveries are to be delayed for a corresponding length of time only. Price to be fifty-eight dollars net, per ton of 2,240 pounds of finished steel rails, ex. ship or f. o. b. cars at Chicago, Ills., seller's option. Terms of payment, cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed without fault of said steel company, payment is to be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate. Rails to be inspected at mill as fast as completed and ready for shipment. In witness whereof the said Hinckley has hereto set his hand and seal, and the Pittsburgh Bessemer Steel Company, Limited, by its duly authorized officers, hath signed and affixed its corporate seal, the day and year aforesaid. It is further agreed that the Pittsburgh Bessemer Steel Company, Limited, are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made. It is understood that the purchaser shall have the right to make one-half of the order fifty-six (56) pounds per yard, pattern No. 4 of said steel company, notice to be given thirty days before the time for the delivery of the rails. F. E. Hinckley.

"Chicago, Ills., February 18, 1882.

"C. H. Odell, Broker."

One copy of the contract was signed by Hinckley, and a duplicate of it was signed by the company. The defendant pleaded the general issue, and the case was tried by the court on the due waiver of a jury. The court made the following special finding of facts:

"(1) That the written agreement set out and described in the declaration was duly executed by the plaintiff and defendant in said cause, as alleged in said declaration.

"(2) That immediately after the making of said contract, and before the time to begin the execution thereof, the plaintiff purchased the requisite amount of material from which to manufacture the six thousand tons of steel rails called for by said contract, and that, after the purchase of said supplies by plaintiff, there was a decline in the value thereof, before the time for the delivery of any portion of said rails, and that lower prices for such supplies ruled during the months of May, June, July, and August, 1882.

"(3) That it appears from the parol proof heard on said trial, aside from the provision in said written contract in regard to drilling directions, that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof, and that each railroad company has its own special rules for drilling, and the drilling of such rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer in order to fully complete the rails for use.

"(4) That, by letters dated April 3d, April 20th, April 26th, and April 28th, from plaintiff's agents to defendant, and which letters were duly received by defendant before May, 1882, defendant was requested to furnish drilling directions for the rails to be delivered in May, under said contract, and defendant not only neglected to comply with such request and furnish such directions, but defendant also notified plaintiff, in reply to such request, that he, defendant, was not then prepared to receive the rails which were to be delivered under said contract in the month of May. Again, about the fifteenth of June, defendant informed plaintiff that he was becoming discouraged about being able to take the rails. That, about June 23d, plaintiff notified defendant that it was ready to commence rolling the rails for the July deliveries, as well as to cover the thousand tons specified in the contract for delivery in May, of which plaintiff had postponed delivery at defendant's request, and asked for drilling directions from the defendant; but defendant wholly neglected to give such drilling directions. That about the twenty-sixth of July, defendant, in substance, informed plaintiff's agents that his financial arrangements for money to pay for said rails, pursuant to said contract, had failed, and that he could not take said rails unless plaintiff would sell them to him on six and twelve months' credit, for which the notes of the railroad company for which defendant was acting would be given, which defendant would indorse, and also further secure with first-mortgage bonds, as collateral, at fifty cents on the dollar, but, unless he could secure the rails on such terms, he could not take them, and that plaintiff declined to accept said proposition for the purchase of said rails on credit; and I further find that, on the thirtieth of August, 1882, plaintiff notified defendant that the time for the completion of his contract for the purchase of said rails had expired, and requested defendant to advise it whether he would accept the rails or not. To this request defendant made no reply.

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[1] Affirming 17 Fed. 584.

"I further find that, while plaintiff did not expressly agree with defendant to postpone the time for the delivery of the rails to be made and delivered under said contract, yet plaintiff did in fact delay the rolling and delivery of the rails to be delivered in May, and that, by reason of the repeated statements of defendant that he was not ready to give drilling directions, not ready to use said rails, and not ready to accept them, plaintiff did postpone rolling said rails, and in fact never rolled any rails to be delivered on said contract, but that plaintiff was at all times during the months of May, July, and August ready and able, in all respects, to fulfill said contract and make said rails, and the same would have been ready for delivery, as called for by said contract, if defendant had furnished drilling directions, and had not stated to plaintiff's agents that he was not ready to furnish said drilling directions, and not ready to accept said rails. I further find that on or about the fifteenth day of September, 1882, defendant was formally requested to furnish drilling directions and to accept said rails, and that he replied to such request that he should decline to take any rails under said contract, and that he had made arrangements to purchase rails of others at a good deal lower price. I therefore find, from the testimony in this case, that defendant, by requesting plaintiff to postpone the delivery of said rails, and by notifying the plaintiff that he was not ready to accept and pay for said rails, excused the plaintiff from the actual manufacture of said rails and a tender thereof to defendant. And I further find that defendant's statement to plaintiff, on the twenty-sixth of July, that he could not pay cash for said rails, as called for by the contract, and that he wished to buy them on credit, was in fact a notice that he would not be able to pay for said rails if rolled and tendered to him by plaintiff. I therefore conclude, and so find as a matter of fact, from the evidence in the case, that said plaintiff in apt time requested defendant to furnish directions for the drilling of said rails, and that defendant neglected and refused to do so, and that, although plaintiff was ready and able to fully perform said contract, and make and deliver said rails to defendant as required by said contract, defendant refused to accept and pay for said rails.

"(5) That plaintiff manufactured and sold to other persons 4,000 tons of steel rails, from the materials so purchased, with which to perform said contract with defendant, for which said rails plaintiff received $54.60 per ton, delivered at a port on Lake Huron, and that plaintiff made a profit of $1.60 per ton on said 4,000 tons; that, by reason of defendant's refusal to accept said rails, the plaintiff had no employment for its mill for a time, and was obliged to stop its mill for about three weeks in the month of August, 1882.

"(6) That it would have cost plaintiff $50 per ton to have manufactured and delivered the rails called for by said contract to defendant, according to the terms of said contract; so that plaintiff's profits, if it had not been prevented from fulfilling said contract by the conduct of defendant, would have been $8 per ton on each ton of rails called for by said contract. And, because of said facts, I find that defendant was guilty of a breach of said contract, and that plaintiff hath sustained damage, by reason of such breach, in the sum of $42,400."

On these findings, a judgment was entered for the plaintiff for $42,400 damages, and for costs. 17 Fed. 584. To review that judgment the defendant has brought this writ of error. After the record was filed in this court, it being discovered that there was an error in computation in entering the judgment for $42,400, instead of $41,600, the circuit court allowed the plaintiff to remit the difference, $800, and an order was entered accordingly, as of the date of the judgment.

On the special findings, the only question open for review is whether the facts found are sufficient to support the judgment. There can be no question that, on those facts, the defendant is liable in damages for a breach of the contract. It is provided in the contract that the rails are "to be drilled as may be directed." The circuit court finds that it appears from the proof, aside from the provision in the written contract in regard to drilling directions, "that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof;" that each railroad has its own special rules for drilling; that the drilling of the rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer, in order to fully complete the rails for use; that, by four letters, written in April, 1882, by the agents of the plaintiff to the defendant, and which letters were duly received by the defendant before May, 1882, he was requested to furnish drilling directions for the 1,000 tons of rails to be delivered in May, under the contract; that he neglected to comply with that request, and also notified the plaintiff that he was not then prepared to receive the rails which, by the contract, were to be delivered in May; that in June the plaintiff again asked for drilling directions from the defendant, in respect both to the 1,000 tons, and to the 2,500 tons to be delivered in July, but the defendant neglected to give such drilling directions; and that, in the latter part of July, he notified the plaintiff, in substance, that he would not perform the contract. The circuit court further finds that, by reason of the repeated statements of the defendant that he was not ready to give drilling directions, not ready to use the rails, and not ready to accept them, the plaintiff postponed the rolling of them, and never rolled any rails to be delivered on the contract, but was at all times during May, July, and August, 1882, ready and able to fulfill the contract and make the rails, and the same would have been ready for delivery as called for by the contract, if the defendant had furnished drilling directions, and had not stated to the agents of the plaintiff that he was not ready to furnish the drilling directions, and not ready to accept the rails; and that, on or about the fifteenth of September, 1882, he was formally requested to furnish drilling directions and to accept the rails, and replied to such request that he should decline to take any rails under the contract, and had made arrangements to purchase rails of others at a lower price. The circuit court also finds that the defendant, by requesting the plaintiff to postpone the delivery of the rails, and by notifying the plaintiff that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing them and tendering them to the defendant. This conclusion is entirely warranted by the facts found, and, on those facts, the defendant must be held liable in damages. The only other question open on the findings is as to the proper rule of damages.

The circuit court finds that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms; that the profits of the plaintiff, if the conduct of the defendant had not prevented it from fulfilling the contract, would have been $8 per ton on each of the 6,000 tons, being $48,000; and that the plaintiff manufactured and sold to other persons 4,000 tons of rails from the materials purchased by it with which to perform the contract with the defendant, and received for such rails $54.60 per ton, and made a profit of $1.60 per ton on the 4,000 tons, being a profit, in all, of $6,400. Deducting this $6,400 from the $48,000, leaves $41,600, for which amount the judgment was finally entered.

The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present. The proposition that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the thirty-first of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

It is found by the circuit court that, immediately after the making of the contract, and before the time to begin its execution, the plaintiff purchased the requisite amount of material from which to manufacture the 6,000 tons of rails; that, after the purchase of such supplies there was a decline in their value before the time arrived for the delivery of any part of the rails; and that lower prices for such supplies ruled during May, June, July, and August, 1882. It is also to be inferred, from the price at which the 4,000 tons of rails were sold by the plaintiff, that the market price of rails declined below the price named in the contract; and the reason assigned by the defendant, in September, 1882, for not taking any rails under the contract, was, that he had made arrangements to purchase rails of others at a lower price. Under these circumstances, the defendant is estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages adopted by the circuit court was the proper one. It was in accordance with the rule laid down by this court in Railroad Co. v. Howard, 13 How. 307. In that case a contractor for the building of a railroad sued the company for its breach. On the question of damages this court said, (page 344:) "It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that the profits are not to be allowed, understanding, as we must, the term 'profits,' in this instruction, as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains propter rem ipsam non habitam. And, in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations or states of the market are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. See Masterton v. Mayor, etc., 7 Hill, 61, and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

In U. S. v. Speed, 8 Wall. 77, where the defendant agreed to pack a specified number of hogs for the plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, this court, citing with approval Masterton v. Mayor, etc., held that the measure of damages was the difference between the cost of doing the work and the price agreed to be paid for it, "making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." These views were again approved by this court in U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81.

In the present case the ability of the plaintiff to fulfill the contract at all times is found as a fact by the circuit court, as also the fact that, by reason of the defendant's refusal to accept the rails, the plaintiff was obliged to stop its mill for about three weeks, in August, 1882. The defendant received the benefit of all the mitigation of damages which, upon the facts found, he was entitled to claim, and the benefit of all the profits made by the plaintiff which could properly be regarded as a substitute for the profits it would have received had its contract with the defendant been carried out. The defendant objects that, within the statement of the rule in U. S. v. Speed, there was no deduction made in this case for the time saved, and the care, trouble, risk, and responsibility avoided by the plaintiff by not fully executing the contract; but there are no findings of fact which raise any such question. The finding is that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms. Under this finding, it must be held that every proper element of cost entered into the $50; and it was for the defendant to have requested findings which would authorize an increase of that sum as cost.

There is a bill of exceptions in the case, on which two questions are raised by the defendant as to the admission of testimony. The contract between the parties was negotiated by C. H. Odell, who signed it as broker, between whom and the defendant the correspondence thereafter, down to and including the first of May, 1882, was carried on, Odell acting for the plaintiff. He made the contract under special instructions, his authority being limited to that of a sales agent. On his examination as a witness at the trial, he testified that all of his communications with the plaintiff in regard to the business with the defendant were in writing or by telegram. He also testified, without objection, that he kept the plaintiff fully advised of his correspondence with the defendant concerning the rails. H. P. Smith, the business manager of the plaintiff, was then called as a witness for the plaintiff, and was asked if the plaintiff was advised of the correspondence between Odell and the defendant, which had been read in evidence, and if Odell's actions were approved by the witness as manager of the plaintiff. To this the defendant objected, on the ground that the communications between Odell and the plaintiff consisted of letters and telegrams, which were the only competent evidence of the contents thereof. The court overruled the objection, and the witness stated that the company was advised of the correspondence and actions of Odell, and fully approved and ratified the same. The defendant excepted to the decision admitting the evidence. We see no objection to the admission of this evidence, independently of the fact that Odell had, without objection, testified to substantially the same thing. The defendant, in his correspondence with Odell, all of which is set forth in the bill of exceptions, treated Odell as representing the plaintiff, and cannot now be heard to question his authority to do so, or to demand further evidence of such an authority, or of the adoption by the plaintiff of what Odell was doing, saying, and asking on behalf of the plaintiff. The question asked of Smith, as to whether he, as manager of the plaintiff, approved of Odell's actions, and the answer he made, were therefore unnecessary, and could not affect the merits of the case.

Smith was further asked to state in detail the elements of the cost of rolling the rails in question. He produced a memorandum showing items taken from the plaintiff's books, which, added together, exhibited the cost, in August, 1882, of manufacturing one ton of such rails as those described in the contract; and, on being asked by the plaintiff's attorney to testify to those items, the court, under the defendant's objection, allowed him to read the items from the memorandum. He further testified, under an objection and exception by the defendant, that the actual cost to the plaintiff of making and delivering the rails in Chicago would have been $48.25; that he stated the elements of such cost from a memorandum prepared by himself, the elements being taken from the books of the plaintiff; that he knew the purchase price of all material which went into the manufacture, because he purchased all of it himself; that the statement was prepared by him from his personal knowledge of the cost; that he called off the items from a penciled memorandum to the book-keeper, who wrote them down; that he (the witness) knew the items to be correctly stated; and that the information as to the items was made up from records running through a series of four or five months, and representing an average as to the cost per ton. The defendant contends that this evidence was inadmissible, in the absence of an opportunity for him to examine the plaintiff's books, with a view to a cross-examination of the witness as to the mode of computation adopted by him, the memorandum being, as contended, the result of the conclusions of the witness from the examination of a large number of entries in the books of the plaintiff. It is a sufficient answer to this objection, that the cost of the rails was not taken by the court at the sum of $48.25, the sum fixed by Smith, but the bill of exceptions shows that the cost was taken at $50 a ton, from the testimony of Richard C. Hannah, another witness; so that, even if the testimony was erroneously admitted, (which it is not necessary to decide,) the defendant suffered no prejudice from its admission.

The judgment of the circuit court is affirmed.

HOGAN v. KYLE.

(35 Pac. 399, 7 Wash. 595.)

Supreme Court of Washington. Jan. 6, 1894.

Appeal from superior court, King county; Mason Irwin, Judge.

Action by F. V. Hogan against George F. Kyle for breach of contract to buy real estate. From a judgment for plaintiff, defendant appeals. Reversed.

Preston, Albertson & Donworth, for appellant. H. B. Slauson, for respondent.

DUNBAR, C. J. On the 27th day of February, 1890, respondent and appellant entered into a written contract wherein respondent agreed to sell the appellant certain real estate for the sum of $2,500, one-third of which was paid at the time of the execution of the contract; appellant to pay the balance of the purchase price in two equal installments, the first of which was to be paid on the 27th day of May, 1890, and the second on the 27th day of August, 1890. Time was expressly made the essence of the contract. The appellant paid no part of the purchase price, except the sum which was paid at the time the contract was executed. It does not appear that defendant entered into possession of the property, or exercised any control over it. On November 14, 1892, suit was commenced by the respondent to recover a money judgment against the appellant for the amount of the two unpaid installments, with interest. The complaint simply alleged the making of the contract, failure to pay, the ownership of the property, and the tender of a good and sufficient deed prior to the commencement of the action. A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant answered, alleging possession in the respondent, but denying his power to give good title. Alleging that respondent had never demanded of appellant the contract price of the land at any time prior to November 14, 1892, the date of the commencement of the action, and never tendered to appellant any deed or conveyance purporting to convey said land until said 14th day of November, 1892, and never at any time conveyed said premises; that, long prior to said last-named date, appellant had informed and notified respondent that he did not have or claim any further interest in said property, and that he would not pay any further installment provided for by said contract, and that the plaintiff did not, up to said November 14, 1892, assert any further right to the balance of said contract price, nor dissent to nor deny said claim of defendant that he was no longer bound by said contract; and that long prior to said last-named date the plaintiff had exercised said option reserved to him under said contract, and had elected to rescind said contract, and to retain as a forfeit the first payment that had been made to him by the defendant thereunder, aforesaid. At the outset of the trial, appellant objected to the introduction of any testimony in behalf of the plaintiff on the ground that no cause of action was stated in the complaint. This objection was overruled. At the conclusion of respondent's testimony, appellant moved for a nonsuit, which motion was overruled. Thereupon, he rested upon his motion, and did not offer any testimony; and the judge instructed the jury to bring in a verdict against the appellant for the balance of the contract price, with interest; which being done, judgment was entered thereon, from which judgment appellant has appealed. At the commencement of the action the appellant moved to have the case transferred to the equity calendar, which motion was denied. The demurrer and the motion for a nonsuit raised substantially the same questions.

The judgment in this case will have to be reversed, in any event, for under its terms the respondent recovers the full purchase price, and is allowed to retain the land which represented the purchase price. In this case these are dependent obligations upon which the respondent is suing. When the first installment became due, he could have recovered the amount then due as upon an independent contract; but having elected to wait until the last installment became due, and upon the payment of which defendant would be entitled to a deed, the obligations become dependent. They all relate back to the contract, and respondent cannot sustain an action for either installment without proof of performance or readiness to perform on his part. McCroskey v. Ladd, (Cal.) 31 Pac. 558, and cases cited. In that case the court said: "There is but one single cause of action,—one and indivisible. The defendant, if he would maintain his deed, must pay all; and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." It is not enough that the deed was tendered at any particular time, but the tender must be kept good so that it may be taken into consideration in the entry of the judgment. Plaintiff here simply shows that the tender had been made prior to the commencement of the action, and it is therefore insufficient excepting on the theory that the judgment could be rendered independently of the performance of his part of the contract by the vendor, which would result in allowing the vendor to keep both the money and the land. On that proposition we quote from Warvelle on Vendors, (page 961:) "There are cases, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure, however, is apparent on its face, for it gives the vendor his land, as well as its value, and is not now regarded as a correct rule in either country." The rule in such cases is that the vendor has a right to the fruits of his bargain, and is entitled to compensation for any loss he may suffer by reason of its nonconsummation. What his damages are, in such circumstances, must be alleged and proven, like any other fact in the case. Under one set of circumstances, the measure of damages might be one thing, and under other circumstances the measure might be governed by an entirely different rule. The land may have deteriorated in value, and his damages would be great, or it might have increased in value, and the damages would be nominal. As is well argued by the appellant in this case, so far as the complaint reveals, the land may be worth as much or more than it was when the agreement was executed; and the respondent, having received an advance payment, which is forfeited, may actually be benefited. The cases cited in Warvelle fully sustain the announcement in the text, both as to the unfairness of allowing the vendor to retain the land and the money, and as to the measure of damages. In Railroad Co. v. Evans, 6 Gray, 25, it was held that, in an action at law by the vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach. Under this rule, which seems to us to be an equitable one, and one which is adopted by many courts, the complaint is plainly deficient. The case last above cited also holds that a vendor may enforce in equity the specific performance of a written contract for the sale of land. In fact, the prevailing modern authority is that in a case of this kind the vendor can either sue at law for damages, or resort to equity for specific performance. Mr. Pomeroy, in his work on Contracts, (page 6,) bases his adherence to this doctrine on the ground of mutuality. The remedy which is enjoyed by one party to a contract must be enjoyed by the other, and as an example he gives the simplest form of contract for the sale of land, when the vendor agrees to convey, and the purchaser merely promises to pay a certain sum as the price. Since the latter may, by a suit at equity, compel the execution and delivery of the deed, the former may also, by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money. "A suit in equity against the vendee, to compel a specific execution of a contract of sale, while in effect an action for the purchase money, has nevertheless always been sustained as a part of the appropriate and acknowledged jurisdiction of such court, although the vendor has in most cases another remedy by an action at law upon the agreement." Warv. Vend. pp. 779, 780, and cases cited. So that, considering it either as a legal or equitable action, and considering the complaint amended so as to incorporate the allegations of tender sought to be set up in the reply, the action must equally fail, for the complaint, on its face, shows such a delay on the part of the respondent in bringing his action that, unexplained, it amounts to a waiver of respondent's rights under the contract, and an acceptance of the forfeiture. "The court of chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment, on his part, of the contract." Fry, Spec. Perf. § 1070. "The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff, (whether vendor or purchaser,) either in executing his part of the contract, or in applying to the court, will debar him from relief. 'A party cannot call upon a court of equity for specific performance,' said Lord Alvanley, M. R., (u) 'unless he has shown himself ready, desirous, prompt, and eager.' Or, to use the language of Lord Cranworth, 'Specific performance is relief which this court will not give, unless in cases where the parties seeking it come promptly, as soon as the nature of the case will permit.'" Id. § 1072. To the same effect, Pom. Cont. § 408, and cases cited. It is true that a few of the states, notably Ohio, hold that the laches must fall outside of the statutes of limitation, but the great weight of authority, as we have been able to gather it from the cases, is to the contrary; and relief has been refused on the principle that acquiescence for an unreasonable length of time after the party was in a situation to enforce his right, under the full knowledge of the facts, was evidence of a waiver or abandonment of right, and what shall be deemed a reasonable time must be determined from the circumstances of the case. Six months, in some cases, might be as unreasonable as six years in others. It must be borne in mind that a distinction is made, in the discussion of the cases, between the cases where time is made the essence of the contract, and where it is not; and the conclusion deduced from the authorities is that where time is made the essence of the contract the apparent delay or omission of duty must be explained, or the relief will not be granted.

In this case time was made the essence of the contract, by express terms. The complaint shows that there was no attempt to enforce the claim until two years and three months after the contract matured, and makes no explanation whatever for the delay. Nor are the averments of the complaint strengthened by the proofs, for the proofs show that no demand, of any kind whatever, had been made, on the part of respondent, until the day the suit was brought. The respondent should not be allowed to speculate in values, so far as this contract is concerned; to wait and see whether the value of the land would enhance or depreciate before he made his election either to enforce the performance or accept the forfeiture. We think the provision of this contract, that, "if the said party of the second part, his heirs, administrators, or assigns, shall fail to pay the full amount of either of the above-specified installments and interest when the same shall become due, as above specified, the said party of the first part shall have the right, at their option, to rescind and cancel this agreement, and in case of such rescission and cancellation all rights of the said party of the second part, his heirs and assigns, shall be terminated, and all payments heretofore made on this contract shall be forfeited," fairly construed, guaranties to the respondent a right which it must exercise at the maturity of the contract,—the time when he would have a right to make the election; and, as he did not proceed to enforce the contract, the appellant had a right to presume that, inasmuch as he had taken no affirmative action, by tendering the deed, he had elected the remedy which was consistent with silence, namely, the acceptance of the forfeiture; and, considering the rapid changes in value of the real estate in this country, we think an unexplained delay of two and a quarter years ought to prevent the respondent from asserting his claim in a court of equity.

The complaint, therefore, being insufficient, either at law or equity, appellant's demurrer should have been sustained. This conclusion renders unnecessary the discussion of the other errors assigned. For the reasons given, the judgment will be reversed, with instructions to sustain appellant's demurrer to the complaint.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

McGUINNESS v. WHALEN.

(18 Atl. 158, 16 R. I. 558.)

Supreme Court of Rhode Island. July 13, 1889.

Assumpsit. On demurrer to the declaration.

Edwin D. McGuinness and *John Doran*, for plaintiff. *Edward D. Bassett*, for defendant.

DURFEE, C. J. The declaration sets forth that at an administrator's sale at auction, held February 28, A. D. 1885, by William W. Nichols, administrator *de bonis non* on the estate of John Charlton, deceased, all the right, title, and interest of the decedent in certain land described was struck off to the defendant for $3,100 bid by him, said sum being the highest bid therefor; that the defendant paid $150 down as earnest money; that afterwards, at a time appointed, the administrator was ready with his deed to convey the land in pursuance of the sale, but the defendant refused to accept it, and pay over the residue of said $3,100; that subsequently, on May 26, A. D. 1885, the property was again put up at auction by said administrator, and struck off to William H. Washburn for $2,150, the highest bid therefor, and conveyed to him for that sum. The declaration then proceeds as follows, to-wit: "And the plaintiff avers that on the 21st day of November, 1887, he was appointed administrator *de bonis non* of the estate of John Charlton, deceased, in the place and stead of said Nichols, removed, whereby the defendant became liable and promised to pay to the plaintiff the difference between said sum of $3,100 and the costs of said second auction sale, viz., $40.17, and the sum of $2,150, amounting to the sum of $990.17." The declaration also contains the common money count. The defendant has demurred to the declaration generally, but both parties have treated the demurrer as if it were simply a demurrer to the special count. We will so treat it. The question, as it has been argued to us, is whether the count is good as a count upon a promise to be implied from the facts alleged. We think not. The contract which the defendant entered into when he made his bid was a contract to pay the price bid by him for the premises upon receiving a deed thereof, and, if on tender of the deed he refused to complete the payment, he committed a breach of said contract, and laid himself liable to an action upon it for damages. In such action the measure of damage is the loss to the vendor from the default of the vendee, and it may be that the jury, upon proof of the second sale, would find the damages to be the difference between the two bids and the expense of the second sale; but the question would be purely one of damages, and they would not be shut up to that amount. McCombs v. McKennan, 2 Watts & S. 216. In order to make the vendee liable in *assumpsit* for such difference and expense, in case of his default, it should be made a condition of the sale that in such case the property should be resold, and the vendee held to pay such difference and expense. Adams v. McMillan, 7 Port. (Ala.) 73, was a case of real estate sold at auction, and afterwards resold on default by the vendee. The declaration contained a count like the special count here. The court held that where a declaration does not aver, as part of the contract of sale, a condition that the land shall be resold in case of such default, but only alleges the difference in price of the two sales, and as a consequence of the vendee's breach of his contract a liability on his part to pay that difference, being framed on the supposition that the difference is recoverable as on a contract, and not as unliquidated damages, the declaration will be bad on demurrer. Robinson v. Garth, 6 Ala. 204. The plaintiff contends that the mode of declaring here used is proper, because the sale was judicial, and in such sales the defaulting vendee is liable for the deficiency on resale, whether the terms of sale so provide or not. An administrator's sale, however, under our statutes, is not a judicial sale, as was decided by Judge STORY in Smith v. Arnold, 5 Mason, 414, 420. It has been held in Alabama that purchasers at official sales who make default are liable by implied contract for the deficit on resale. Lamkin v. Crawford, 8 Ala. 153; Hutton v. Williams, 35 Ala. 503, 513. We do not find the doctrine recognized elsewhere, (2 Freem. Ex'ns, 2d Ed., § 313;) nor, in our opinion, can an administrator's sale be regarded as an official sale. In some states the defaulting purchaser is liable for "the deficiency arising on resale" by statute. Alexander v. Herring, 54 Ga. 200. We have no such statute. The subject of the sale under which the question here arises was real estate, the title to which could not pass to the purchaser without deed. Whether, if the subject had been goods and chattels, the same mode of declaring would have been bad, is a question on which we express no opinion. Demurrer, regarded as a demurrer to the special count, sustained.

ALLEN v. MOHN.

(49 N. W. 52, 86 Mich. 328.)

Supreme Court of Michigan. June 5, 1891.

Error to circuit court, Branch county; NOAH P. LOVERIDGE, Judge.

F. A. Lyon, for appellant. *W. H. Lockerby*, for appellee.

GRANT, J. Plaintiff and defendant made a contract, by which plaintiff agreed to sell to defendant certain real estate. The contract was made in November, 1886. In September, 1890, defendant informed plaintiff that he could not go on with the contract, refused to pay the interest which was then due, and said that he would give up the contract. While the testimony is not clear as to the circumstances under which plaintiff took possession of the land, it appears to be conceded by both parties that defendant abandoned the premises, and plaintiff thereupon took possession. The contract contained the following clause: "It is mutually agreed between the parties that the said party of the second part shall have possession of said premises on and after date hereof, and he shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid; and, if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid on such contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom." Upon the abandonment of the contract and of the premises by defendant plaintiff had his choice of three remedies: (1) Bill for specific performance; (2) suit at law to recover the purchase price; and (3) a repossession of the premises and a suit to recover damages for a breach of the contract. The latter remedy is supported by the following authorities: Railroad v. Evans, 6 Gray, 25; Griswold v. Sabin, 51 N. H. 170; Meason v. Kaine, 67 Pa. St. 126, 63 Pa. St. 335; Porter v. Travis, 40 Ind. 556; Wasson v. Palmer, 17 Neb. 330, 22 N. W. Rep. 773. In such case the measure of damages is the difference between the contract price and the value of the land at the time of abandonment and re-entry, less what has been paid. This rule is just, and places vendor and vendee upon a footing of equality and mutuality. In order to deprive the vendor of this remedy it must either be excluded by the terms of the contract, or waived by his acts and conduct. In this case the contract does not exclude it, nor has the plaintiff waived it. The circuit court was in error in directing a verdict for the defendant. Judgment is reversed, with costs, and a new trial ordered. The other justices concurred.

FLUREAU v. THORNHILL.

(2 W. Bl. 1078.)

Easter Term, 16 Geo. III. C. P.

The plaintiff bought at an auction a rent of £26 1s. per ann. for a term of thirty-two years, issuing out of a leasehold house, which let for £31 6s. The sale was on the 10th of October, 1775. The price at which it was knocked down to him was £270, and he paid a deposit of 20 per cent., or £54. On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back his deposit with interest and costs. But the plaintiff insisted on a farther sum for damages in the loss of so good a bargain; and his attorney swore, he believed the plaintiff had been a loser by selling out of the stocks to pay the purchase money, and their subsequent rise between the 3d and the 10th of November; but named no particular sum. Evidence was given by the defendant, that the bargain was by no means advantageous, all circumstances considered; and the auctioneer proved that he had orders to let the lot go for £250. The defendant had paid the deposit and interest, being £54 15s. 6d. into court: But the jury gave a verdict, contrary to the directions of DE GREY, C. J., for £74 15s. 6d., allowing £20 for damages.

Davy moved for a new trial, against which Glyn shewed cause; and by—

DE GREY, C. J. I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.

GOULD, J., of the same opinion.

BLACKSTONE, J., of the same opinion. These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. For curiosity, I have examined the prints for the price of stock on the last 3d of November, when three per cent.'s sold for 87½. About £310 must therefore have been sold to raise £270. And if it costs £20 to replace this stock a week afterwards (as the verdict supposes), the stocks must have risen near seven per cent. in that period, whereas in fact there was no difference in the price. Not that it is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the price.

NARES, J., hesitated at granting a new trial; but next morning declared that he concurred with the other judges.

Rule absolute for a new trial, paying the costs.

HOPKINS v. LEE.

(6 Wheat. 109.)

Supreme Court of the United States. Feb. Term, 1821.

Error to the circuit court for the District of Columbia.

This was an action of covenant, brought by the defendant in error, Lee, against the plaintiff in error, Hopkins, to recover damages for not conveying certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance held by one Rawleigh Colston, upon an estate called Hill and Dale, and which Lee had previously granted and sold to Hopkins, and for which the military lands in question were to be received in part payment. The declaration set forth the covenant, and averred that Lee had completely removed the incumbrance from Hill and Dale. The defendant below pleaded: (1) That he had not completely removed the incumbrance; and (2) that he (the defendant below) had never been required by Lee to convey the military lands to him; and on these pleas issues were joined. Upon the trial, Lee, in order to prove the incumbrance in question was removed, offered in evidence to the jury a record of the proceeding in chancery, on a bill filed against him in the circuit court, by Hopkins. The bill stated that on the 23d of January, 1807, the date of the agreement on which the present action at law was brought, Hopkins purchased of Lee the estate of Hill and Dale, for which he agreed to pay $18,000, namely, $10,000 in military lands, at settled prices, and to give his bond for the residue, payable in April, 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Colston for a large sum, which Lee had promised to discharge, but had failed so to do, in consequence of which Hopkins had paid off the mortgage himself. The bill then claimed a large sum of money from Lee, for having removed this incumbrance, and prayed that the defendant might be decreed to pay it, or in default thereof that the claimant might be authorized, by a decree of chancery, to sell the military lands, which he considered as a pledge remaining in his hands, and out of the proceeds thereof to pay himself. On the coming in of Lee's answer, denying several of the allegations of the bill, the cause was referred to a master, who made a report, stating a balance of $427.77, due from Hopkins to Lee. This report was not excepted to, and the court, after referring to it, proceeded to decree the payment of the balance. To this testimony the defendant in the present action objected, so far as respected the reading of the master's report, and the decretal order thereon; but the objection was overruled by the court below, and the evidence admitted. The counsel for the plaintiff in error then prayed the court to instruct the jury, that in the assessment of damages, they should take the price of the military lands as agreed upon by the parties in the articles of agreement upon which the action was brought, as the measure of damages for the breach of covenant. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted; and a verdict and judgment thereon being rendered for the plaintiff below, the cause was brought by writ of error to this court.

Pinkney & Swann, for plaintiff in error. Jones & Lee, for defendant in error.

LIVINGSTON, J. The first question which this court has to consider is, whether the proceedings in chancery were properly admitted in evidence in the court below.

It is not denied, as a general rule, that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence, a verdict and judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined, in England or in this country, to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of courts of admiralty, to ecclesiastical tribunals, and, in short, to every court which has proper cognizance of the subject-matter, so far as they profess to decide the particular matter in dispute. Under this rule, the decree in this case was proper evidence, if it decided, or professed to decide, the same question which was made on the trial at law. For to points which came only collateraly under consideration, or were only incidentally under cognizance, or could only be inferred by arguing from the decree, it is admitted that the rule does not apply. On a reference to the proceedings at law and in chancery, in the case now before us, the court is satisfied that the question which arose on the trial of the action of covenant, was precisely the same, if not exclusively so, (although that was not necessary,) as the one which had already been directly decided by the court of chancery. The bill, which was filed by the present plaintiff in error, states that on the 23d of January, 1807, which is the date of the agreement on which the action at law is brought, Hopkins purchased of Lee the estate of Hill and Dale, for which he was to pay $18,000; that is, $10,000 in military lands, at settled prices, and the remainder in bonds, payable in April, 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Rawleigh Colston for a large sum, which Lee had promised to discharge, but that he had failed so to do, in consequence of which Hopkins had paid the mortgage himself. The complainant then claims a large sum from Lee, for having removed this incumbrance, and prays that the defendant may be decreed to pay it, or in default thereof that the complainant may be authorized, by a decree of the court, to sell the military lands, which he considered as a pledge in his hands, and out of the proceeds to pay himself. Not a single demand is stated in the bill, except the one arising out of the complainant's extinguishment of the incumbrance, which Lee had taken upon himself to remove.

On Lee's answer coming in, denying several of the allegations of the bill, the cause is referred to a master commissioner, who, after a long investigation, in the presence of both parties, and the examination of many witnesses, makes a report by which Hopkins is made a debtor of Lee in the sum of $427.77. On inspection of this report, it will be seen that the chief if not the only controversy between the parties was, whether Hill and Dale had been relieved from its incumbrance to Colston, by funds furnished by Lee to Hopkins for that purpose, and that, unless that fact had been found affirmatively, a report could not have been made in Lee's favor. The court, after referring to this report, and stating that it had not been excepted to, proceeds to decree the payment of this balance by the complainant to the defendant. From this summary review of the proceedings in chancery, the conclusion seems inevitable that the chief if not sole matter in litigation in that suit, was whether Hill and Dale had been freed of the incumbrance to Colston, by Lee or by Hopkins, and that the report and subsequent decree proceeded on the ground and established the fact that Lee had discharged it, which was also the only point put in issue by the first plea of the defendant, in the action of covenant. No rule of evidence, therefore, is violated in saying that this decree was properly admitted by the circuit court. But if the decree were admissible, it is supposed that the report of the master ought not to have been submitted to the jury. The court entertains a different opinion. No reason has been assigned why a decision by a proper and sworn officer of a court of chancery, in the presence and hearing of both parties, according to the acknowledged practice and usage of the court on the very matters in controversy, not excepted to by either party and confirmed by the court, should not be as satisfactory evidence of any fact found by it, as the verdict of a jury on which a judgment is afterwards rendered. The advantage which a verdict may be supposed to possess over a report, from its being the decision of twelve instead of the opinion of a single man, is perhaps more than counterbalanced by the time which is allowed to a master for deliberation and a more thorough investigation of the matters in controversy. But a better and more satisfactory answer is, that it is the usual, known, and approved practice of the court to whose jurisdiction the parties had submitted themselves. But if this document be withheld from a jury, how are they or the court to arrive at the grounds of the decree or a knowledge of the points or matters which have been decided in the cause? Without it, the decree may be intelligible; but the grounds on which it proceeds, or the facts which it means to decide, may be liable to much uncertainty and conjecture. The report, therefore, as well as the decree was proper evidence, not only of the fact that such report and decree had been made, but of the matter which they professed directly to decide. We are not now called upon to say whether, in those respects, they were conclusive, as they do not appear to have been offered with that view; but without meaning to deny to them such effect, we only say, which is all that the present case requires, that they were competent and proper, in the absence of other testimony, to establish the fact of the removal of the incumbrance by the defendant Lee, from the estate of Hill and Dale.

In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract, on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. Judgment affirmed.

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PUMPELLY v. PHELPS.

(40 N. Y. 64.)

Court of Appeals of New York. March, 1869.

Action for specific performance of a contract to convey land, or in the alternative, damages for the breach. The plaintiff had judgment below for damages, and defendant appeals.

John H. Reynolds, for appellant. Samuel Hand, for respondents.

MASON, J. There has never seemed to me to have been any very good foundation for the rule, which excused a party from the performance of his contract, to sell and convey lands, because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule itself is based.

In England, the rule seems to have been sustained upon the ground of an implied outstanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case on this subject, of Flureau v. Thornhill, 2 W. Bl. 1078, Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title."

While in this country the rule is based upon the analogy between this class of cases and actions for breach of covenant of warranty of title. Baldwin v. Munn, 2 Wend. 399; Peters v. McKeon, 4 Denio, 546. The rule of damages, in an action for a breach of covenant of warranty of title, is settled to be the consideration paid, and the interest; and yet this is an arbitrary rule, and works great injustice many times; and the courts met with the greatest embarrassment in settling it. These difficulties were considered, and well expressed, in the leading case in this state, of Staats v. Ten Eyck's Ex'rs, 3 Caines, 115, in which the court said: "To find a rule of damages, in a case like this, is a work of difficulty; none will be entirely free from objection, or will not, at times, work injustice.

"To refund the consideration, even with the interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin.

"A piece of land is bought solely for the purpose of agriculture, and by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a bona fide vendor to refund its value, and that few fortunes could bear the demand. Who for the sake of one hundred pounds would assume the hazard of repaying as many thousands, to which value the property might rise, by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?" There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A. purchases of B. a city lot for the purpose of building himself a dwelling or buildings upon it, and takes from B. a full covenant deed of the premises, covenanting to assure, warrant and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B. is evicted by a paramount title ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or reasonable return in damages for the law to give to one who holds a covenant to make good and defend the title.

The reasons assigned for this rule in actions for a breach of covenant of warranty of title can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and if he will go on and make expenditures under such circumstances it is his own fault; and besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase in the value of the property as there is in these covenants in deeds, which run with the land through all time.

The supreme court of the United States has refused to yield its sanction to this rule when applied to contracts for the sale of lands, and affirms the doctrine that the reason of the rule as to contracts for the sale of goods and chattels applies with equal force to these executory contracts for the sale of lands. Hopkins v. Lee, 6 Wheat. 109. That rule is where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. Robinson v. Harman, 1 Exch. 850. This case of Hopkins v. Lee, 6 Wheat. 109, is cited with approbation in some of the American cases, and the rule there laid down affirmed.

These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated.

I have referred to this matter simply as furnishing an argument against in any degree extending the rule, and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it. It becomes important in this connection to inquire what that limit is. The general rule certainly is that where the vendor has the title and for any reason refuses to convey it, as required by the contract, he shall respond in law for the damages in which he shall make good to the plaintiff, whom he has lost by his bargain not being lived up to. This gives the vendee the difference between the contract price and the value at the time of the breach, as profits or advantages which are the direct and immediate fruits of the contract. Griffin v. Colver, 16 N. Y. 489; Durkee v. Mott, 8 Barb. 423; Underhill v. Gas-light Co., 31 How. 37; Masterson v. Mayor, etc., of Brooklyn, 7 Hill, 61, 69. Where however the vendor contracts to sell and convey in good faith, believing he has good title, and afterward discovers his title is defective. and for that reason without any fraud on his part, refuses to fulfill his contract, he is only liable to nominal damages for a breach of his contract. Baldwin v. Munn, 2 Wend. 399; Peters v. McKeon, 4 Denio, 546; Conger v. Weaver, 20 N. Y. 140. The rule is otherwise however where a party contracts to sell lands which he knows at the time he has not the power to sell and convey; and if he violates his contract in the latter case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor, that he may have acted in good faith and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser. 2 Pars. Cont. 503, 504, 505; Hopkins v. Grazebrook, 6 Barn. & C. 31; Driggs v. Dwight, 17 Wend. 74; Bush v. Cole, 28 N. Y. 261; Lock v. Furze, L. R. 1 C. P. 441; Robinson v. Harman, 1 Exch. 849; Hill v. Hobart, 16 Me. 164; Fletcher v. Button, 6 Barb. 650; Trull v. Granger, 8 N. Y. 115; Hopkins v. Lee, 6 Wheat. 109; Burwell v. Jackson, 9 N. Y. 535; White v. Madison, 26 N. Y. 124; Lewis v. Lee, 15 Ind. 499; Dean v. Raseler, 1 Hilt. 420; Bitner v. Brough, 11 Pa. St. 127; McNair v. Crompton, 35 Pa. St. 23; Wilson v. Spencer, 11 Leigh, 261; Graham v. Hackwith, 1 A. K. Marsh. 429; Dart, Vendors, 447. This rule, applied to the case at bar, sustains the judgment of the supreme court.

The defendant must be held personally liable on this contract. It is essentially his contract. In order to exempt the contracting party from personal liability, he must so contract as to bind those he claims to represent. Moss v. Livingston, 4 N. Y. 208; Dewitt v. Walton, 9 N. Y. 571; Bay v. Gunn, 1 Denio, 108; Bush v. Cole, supra.

The fact that the party describes himself as trustee, without stating for whom, does not relieve him from personal liability, or change the effect of his engagement. Taft v. Brewster, 9 Johns. 334; White v. Skinner, 13 Johns. 307; Dewitt v. Walton, supra; Bush v. Cole, supra. These views lead to the affirmance of the judgment.

GROVER, WOODRUFF, JAMES, and MURRAY, JJ., concurred with MASON, J., and were for affirmance. DANIELS, J., dissents.

NOTE. In Margraf v. Muir, 57 N. Y. 155, the court says, "The case of Pumpelly v. Phelps, supra, is the widest departure from the general rule of damages in such case that is to be found in the books," but distinguishes it from the one then before the court.

PITCHER v. LIVINGSTON.

(4 Johns. [N. Y.] 1.)

Supreme Court of New York. Feb. Term, 1809.

Mr. Foot, for plaintiff. Mr. Slosson, for defendant.

VAN NESS, J. Although it is not expressly stated in the case, I shall assume the fact to be, that the declaration contains an averment that the plaintiff had been evicted, in consequence of a total failure of the title derived to him under the deed from the defendant. This fact being assumed, there is no difference between the present case and that of Staats v. Ten Eyck's Ex'rs, 3 Caines, 111f, except, that, in this case, beneficial improvements have been made by the plaintiff upon the property, the value of which he contends he is entitled to recover. The case just mentioned is among the most important and interesting, of any that have ever been brought before this court for decision; and, accordingly, it appears to have received the most deliberate consideration. I not only submit to the authority of that case, but I take this occasion to express my perfect acquiescence in the reasons, upon which the determination of it appears to have proceeded. The covenants upon which the breaches were assigned in that case, were the same as in the present, viz. the covenant of seisin, and for quiet enjoyment. The court decided, that the damages, which the plaintiff was entitled to recover, were to be limited to the consideration expressed in the deed, with the interest thereon, and the costs of suit attending the eviction. But in addition to the sum which the plaintiff, according to this rule, would recover, he contends that the defendant is bound to indemnify him for the loss of his improvements. These are estimated at 925 dollars; and the only point left open to discussion, is, whether he has a legal right to demand this sum?

In Staats v. Ten Eyck's Ex'rs, the court determined that the plaintiff was not entitled to recover any damages on account of any increased value of the land. Here a distinction is attempted to be made between an appreciation of the land itself, and that appreciation of it which is produced by the erection of buildings, or the labour bestowed upon it in clearing and cultivating: a very nice, and, as I apprehend, a speculative distinction, to which it would be difficult, if not, in most cases, impossible, to give any practical effect, without danger of the most flagrant injustice. The reasoning of the judges, whose opinions are reported in the case alluded to, goes very far, if not conclusively, to prove, that such a distinction is utterly without foundation. The admission that it might possibly exist, has probably given rise to this action, which, otherwise, I believe, would not, after that decision, have been brought. One, and perhaps the principal reason, why the increased value of the land itself cannot be recovered, is because the covenant cannot be construed to extend to any thing beyond the subject matter of it, that is, the land, and not to the increased value of it, subsequently arising from causes not existing when the covenant was entered into. For the same reason, the covenantor ought not to recover for the improvements; for these are no more the subject matter of the contract between the parties, than the increased value of the land. The doctrine contended for by the plaintiff's counsel, is, that the damages sustained by the covenantee at the time of the eviction, ought to be the measure of compensation. Most clearly, then, the increased value of the land is as much within the reason of this rule, as the improvements; and upon the same principle that the covenantee is entitled to the one, he is to the other.

But if the value at the time of eviction is to be the measure of damages, upon what principle is the consideration and interest, as such, recoverable in addition to the improvements? These must be laid out of view; and the then value be ascertained without reference to them. Besides, if, in determining the rule of damages, the increase of value is to be taken into view, by parity of reasoning, it would be proper, and what would be required by a just reciprocity, to take into consideration any contingent diminution of value. Ersk. Inst. 206. But this has never been heard of nor pretended. No such principle is to be found in the common law, notwithstanding these covenants have been in use upwards of two hundred years. I think this circumstance affords an argument against the measure of damages insisted upon by the plaintiff, and which, of itself, is nearly decisive, that the rule is without legal foundation.

In illustration of my opinion on this part of the argument, I will state a case. A. gives a conveyance, containing covenants of seisin and for quiet enjoyment, of a house and lot. The house constitutes two-thirds of the whole value. The house is afterwards burnt. Then the grantee is evicted for a failure of the grantor's title. He then resorts to both his covenants, which, of course, are broken, for indemnity. What would be the measure of damages? the value of the lot, at the time of eviction, being one-third of what the whole cost him; or the value, as ascertained and agreed upon by the deed itself? No doubt the latter. Whenever the grantee's title has proved to be entirely defective, and there is an eviction consequent thereon, the grantee has a right to rescind the contract, and then, as in other cases depending on the same principle, he recovers back, upon his covenants, what he has paid, with the interest. Fielder v. Starkin, 1 H. Bl. 17; Flureau v. Thornhill, 2 W. Bl. 1078.

In the case just put, I have supposed, that both the covenants of seisin and for quiet enjoyment were broken, and that breaches for both were duly assigned; and I have shown that, if the value of the property at the time of eviction is to be the measure of damages, it necessarily follows, that such diminished value is all which ought to be recovered. It is conceded, that, upon the covenant of seisin only, the recovery is to be confined to the consideration and interest. On the covenant for quiet enjoyment, therefore, the plaintiff must rely, to recover compensation for his improvements. Let us then examine whether, consistently with certain fixed legal principles, the covenantee can recover a greater sum of damages in any case under the covenant for quiet enjoyment, than under the covenant of seisin?

An eviction must be shown before a suit can be maintained on the former covenant. Not so, however, as to the latter; for that is broken, if the grantor has no title, the moment the deed is delivered; and the grantee has an immediate right of action. Whenever the eviction is occasioned by a total want of title in the grantor, then both the covenants of seisin and for quiet enjoyment, are equally broken; and the grantee has his remedy on both. If he proceeds upon the first, he shall recover the consideration expressed in the deed, and the interest. But if he proceeds upon the last, it is said he shall recover according to the value at the time of eviction; and, as I have before remarked, he must be content to recover according to the then value, even though it amounts to one half only of the consideration expressed in the deed.

The case would then stand thus. When the deed contains both these covenants, if the property at the time of eviction be worth one half of the consideration and interest, the grantee may, notwithstanding, upon the covenant of seisin, recover the whole consideration and interest. But if the property happen to be worth double the consideration money and interest, by reason of the improvements made thereon, he may waive the covenant of seisin, and resort to the covenant for quiet enjoyment; and thus recover the whole amount. Can this be possible? It appears to me, that to give such an effect to these covenants, is not reconcilable with any principle of law or justice.

My understanding of the nature of these covenants, when both are contained in the same deed, is this: That the covenant of seisin, which relates to the title, is the principal and superior covenant, to which the covenant for quiet enjoyment, which goes to the possession, is inferior and subordinate. And I am not aware that a case can possibly occur, where the grantor can recover a greater amount in damages for the breach of the latter than of the former; though there are many cases where he may recover less. The suit here is brought upon both covenants; and both, in consequence of the total failure of the defendant's title and the eviction, have been broken. The plaintiff, accordingly, has a right to recover on both; but as the amount of the recovery would, according to my ideas, be the same on each, he must elect on which of them he means to rely, and take nominal damages on the other. The plaintiff is entitled to but one satisfaction, and he has his remedy on either of the covenants, at his election, to obtain it. It will hardly be said, that he can have judgment for the same sum on both the covenants.

The covenant against incumbrances stands upon a different footing, and is governed by different principles. That is strictly a covenant of indemnity; and the grantee may recover to the full extent of any incumbrances upon the land, which he shall have been compelled to discharge. But even there it will be found, that the same rule prevails, in fixing the amount of damages, as in actions upon the covenants of seisin and for quiet enjoyment: that is, the party recovers what he has paid, with the interest, and no more.

But I consider the question arising in this cause as settled by authority; and that, according to established rules of law, the plaintiff is not entitled to any thing more than the value of the land, as settled by the consideration in the deed.

In suits upon the ancient covenant of warranty, beyond all dispute, the recovery was restricted to the value of the land at the time of making the covenant. Cases have occurred, in which the value of the land has been enhanced by subsequent beneficial improvements; but the rule as to the extent of satisfaction, has continued inflexibly the same, without regard to the increased value, by whatever cause it may have been produced. A personal action will not lie, on the covenant of warranty, upon the eviction of the freehold (Bac. Abr. tit. Cov. C.); and for which reason, upon the introduction of alienations by bargain and sale, new covenants were devised, but solely for the purpose of securing to the bargainee the personal responsibility of the bargainor, in case of a failure of his title. I think I am warranted in saying, that it never was designed, by the insertion of these covenants, to establish any other rule of damages than what previously existed; because there is nothing in the terms of the covenants, from which an intention to extend the liability of the covenantor can be inferred; but the contrary is to be presumed, as not a single case is to be found where such a construction of these covenants, which were in a great measure substituted for the covenant of warranty, has ever obtained. The covenant for quiet enjoyment, as I have before remarked, is that upon which compensation for the improvements is to be recovered, if at all. This covenant has a more strict analogy to the ancient covenant of warranty, than any of the other modern covenants. If, then, on the covenant of warranty, the satisfaction recovered in land was to be equivalent to the value of the lands granted, as it existed at the time when the covenant was made, I do conceive, that we are bound to adopt a correspondent rule, when satisfaction is sought to be recovered in money, in a personal action, on the covenant for quiet enjoyment.

Such a rule, moreover, I consider to be conformable to the intention of the parties. I question if one grantor out of ten thousand enters into these covenants with the remotest belief, that he is exposing himself and his posterity to the ruinous consequences, which would result from the doctrine contended for by the counsel for the plaintiff. By giving this doctrine our sanction, we should, in my apprehension, create a most unexpected and oppressive responsibility, never contemplated by the parties, and inflict an equally unmerited punishment upon grantors acting with good faith, and having a perfect confidence in the validity of their title to the land, which they have transferred for what it is reasonably worth.

If any imposition is practiced by the grantor, by the fraudulent suppression of truth, or suggestion of falsehood, in relation to his title, the grantee may have an action on the case, in the nature of a writ of deceit; and in such action he would recover to the full extent of his loss. Har. & But. Notes to Co. Litt. 384a, tit. "Warranty"; 1 Fonb. Eq. 366; 1 Com. Dig. 236, A, 8.

I am aware that it is difficult to lay down any general rule on this subject, wholly free from objection. This is a difficulty which has been felt by the profoundest jurists in all ages. I think, however, that the rule of the common law, which obliges the grantor, when he believes he has a valid title, and acts without fraud, to refund what he has received, with the interest, is as equitable as any that has ever been established; and that this is all which, upon principles of the most rigorous justice, ought to be exacted from him.

My opinion, therefore, is, that, in this case, the plaintiff is entitled to recover the consideration money expressed in the deed, with the interest, and the costs of suit following the eviction, and no more.

SPENCER, J. It is submitted to the court, by the case made and argued in this cause, what is the correct rule of damages, upon covenants of seisin and for quiet enjoyment, contained in a deed conveying lands, in a case where the grantee has made improvements, and where the value of the land has appreciated. It is also made a question, whether the plaintiff is entitled to recover interest on the consideration money paid for the lands.

It is to be regretted, that the case is so loose in several respects. It is fair, however, to infer, from the case as it stands, and as it was argued, that, in point of fact, both covenants were broken; that the plaintiff was evicted for defect of title in the defendant, and that the plaintiff had made improvements, in the usual course of agriculture, on the lands conveyed by the defendant to him, of a substantial kind, to the value of $925.

The case of Staats v. Ten Eyck's Ex'rs, 3 Caines, 112, decides two of the questions which arise out of this case. In that case, though the value of the land had increased by extrinsic causes, the plaintiff was allowed to recover only the consideration paid, with the interest, costs, and counsel fees. The interest was allowed, because the purchaser was subject to an action for the mesne profits; and in the present case it is to be intended, that the plaintiff is liable to pay them to the person who has the title, and consequently it is to be allowed. It will be seen, that these two questions have received a similar determination in the supreme judicial court of Massachusetts. Marston v. Hobbs, 2 Mass. 433. In the case, before cited, of Staats v. Ten Eyck's Ex'rs, the court expressly reserved its opinion, upon a case like the present, where beneficial improvements have been made on the premises after the purchase. It was then considered, that there might be a difference between the case of the rise in value by the natural appreciation of lands, depending in a great measure on ideal worth, and the case of improvements of a beneficial kind.

This question I do not think has been settled in the English courts. It has never been decided in our own, and consequently it appears to me, that we are at full liberty to fix a rule, which shall bear analogy to other cases, and attain complete justice between the parties. I cannot pretend to say, that the rule which I shall lay down will be free from objection, when applied to all cases; and I am not sensible that any general rule, in almost any given case, will invariably be free from exception. It is the very nature of general rules, sometimes to operate harshly; but the necessity of a fixed standard of justice is of more importance to the interests of men, than one that is capricious and fluctuating.

It has I think been erroneously said, that the defect of title is a case of mutual error; on the contrary, from my observation and knowledge of the sale of lands, I think the defect of title is a matter generally and almost universally in the peculiar knowledge of the vendor. It is a rare case for a purchaser to investigate the seller's title; and in most cases, it is impossible. The buyer relies on the allegations of the vendor, on his apparent responsibility to reimburse in case of eviction, upon his possession of the property, and emphatically on his covenants of title and for quiet enjoyment. These covenants, whenever they occur in a deed, seem to me to indicate, beyond all question, that the purchaser did not mean to rely on the title of the vendor alone, but that he meant to have his personal liability, as his guaranty. The language of the vendor corresponds with that of the purchaser, and holds out the idea that he had sold the land at his own peril, and that he would warrant it to be his. Extravagant cases have been put hypothetically, to shew the enormous injustice of the rule, that the vendor must be answerable for improvements. It has been asked, if a piece of land thus sold, with covenants, should become the site of a flourishing city, what fortune could, under a rule allowing for improvements, withstand ruin? It may be retorted to such a question, what is to become of the industrious citizen or mechanic, who has spent his hard earnings in erecting his little house or workshop, relying on the covenant in his deed, if he can only get back his purchase-money and interest? It is not fair, however, to test a rule by extreme cases. To settle a general rule wisely and equitably, we should have an eye to cases which generally occur, and not be startled, on the one hand or the other, by those occurrences which are rare and few. In general, the defect of title happens in sales between man and man, where the improvements are of the ordinary and beneficial kind. If the improvements are merely to gratify the eye of the individual, and to pamper his vanity and pride, a jury would be warranted to take those things into consideration in their assessment of damages.

I lay it down as a rule, which cannot require much illustration to enforce it, on the score of analogy and justice, that in actions for a breach of covenant, the damages are to be estimated according to the value of the thing, when the covenant was broken. Thus, in a covenant for the delivery of specific property at a given day, in case of a failure, the rule invariably is, to allow in damages the value of the thing on the day it ought to have been delivered, and when the covenant was broken. So, also, on contracts for the delivery of stock, the value at the time it ought to have been delivered, and even at the time of trial, has been the criterion of damages. 2 Burrows, 1010; 1 Strange, 406; 2 East, 211. In the present case, the defendant covenanted that the plaintiff should quietly enjoy the land sold. This covenant was violated, when the plaintiff was evicted; and he has lost, by the breach of the covenant, not only the quiet enjoyment of the land, but the usufruct of those erections and improvements, without which, it is fair to say, that the land itself could not have been enjoyed, agreeably to the intention of the parties. It necessarily follows, that had the defendant kept his covenant and allowed the plaintiff to enjoy the premises sold, he would not have been deprived of those improvements made on the thing itself, the making of which was an inducement to the purchase. How it can be called a severe doctrine to compel the vendor to respond in damages for ordinary and necessary improvements, I confess myself incapable of perceiving, when he has undertaken, for a price paid, to assure to the vendee the validity of his title. Very often, and perhaps generally, there is a want of due caution on the part of a vendor, who sells without title; and not unfrequently there is a mixture of fraud, which sets detection at defiance. The rule I have advanced, whilst it will restore to the innocent vendee no more than he has actually lost, will induce greater caution in sellers, who, if responsible only for the principal and interest, will find the selling of land without title an easy and excellent method of raising money, instead of resorting to borrowing.

It follows, from the view I have taken of this question, that the plaintiff, under the covenant for quiet enjoyment, may recover the improvements; and that under the covenant of seisin he could not, unless the grantee was seised by virtue of the deed, and had been evicted under a title paramount. I have not entered into any examination of the ancient method of proceeding under the warrantia chartæ, and the rule which obtained in such case, under the writ of cape ad valentiam; because the covenants of warranty were then considered as real covenants binding only on the grantor and his heirs. It has, however, been urged that the introduction of the covenants of seisin and for quiet enjoyment, were substitutes for the covenant of warranty, and that the same rule ought to follow the substituted covenants. It appears to me much more proper to consider the introduction of personal covenants in the alienation of real property, as immediately assimilating themselves to other personal covenants and contracts, and as subject to the same rules of construction, and the same rule of damages, whenever they are broken. If so, the covenant for quiet enjoyment was not broken until the eviction, and the rule of damages would be the property lost at that time, which would include the price paid for the land, and the value of those erections and improvements which had been added at the plaintiff's expense. It is supposed, that though the covenants of seisin and for quiet enjoyment are distinct, and regard different objects, yet that where the first fails, the latter is merged in it. This principle strikes me as illogical, and unfounded in authority.

There are authorities (Freem. 450, pl. 612; 6 Vin. Abr. 426, pl. 20; Id. 476, pl. 4) which show, that where, in a deed, a man covenants that he hath a good right to convey, &c. and that the party shall quietly enjoy, one covenant goes to the title and the other to the possession. And why a person who has broken two distinct agreements, should protect himself from a responsibility on both, and be liable only on the least extensive one, surpasses my powers of comprehension. A case has been mentioned as decided in the supreme court of Pennsylvania (Bender v. Fromberger, 4 Dall. 436), as bearing on the present; it will be found to have been on the mere covenant of seisin, and power, &c. to convey in fee. The rule I have adopted meets that case, and is reconcilable with it, for there the covenant was broken as soon as it was made, and the damages then sustained were the consideration money and interest.

KENT, C. J. The declaration in this case is upon two distinct covenants in the deed, to wit, the covenant of seisin, and the covenant for quiet enjoyment; and the verdict was taken for the plaintiff, subject to the opinion of the court, as to the rule of damages. We must take it for granted upon this case, and so it seems to have been understood and admitted upon the argument, that both covenants were broken, and the question, then, is, what is the measure of damages, when the two covenants are the subject of one action, and a breach of each has been duly assigned and proved?

The case of Staats v. Ten Eyck's Ex'rs goes very far towards a decision of this question. That was a suit upon the same covenants, and a breach of both was admitted. The point submitted was the rule of damages, "under the covenants mentioned in the deed." The court adjudged that the rule of damages was the consideration money and interest: and I observed, in giving my opinion in that case, that the covenant for quiet enjoyment could have no greater operation, as to damages, than the covenant of seisin. Mr. Justice Livingston, who also gave his opinion, was silent upon that point; but it was a necessary consequence of the judgment of the court, that the increased value of the land could not be recovered under either of those covenants. The doctrine that the measure of damages, under the covenant for quiet enjoyment, is to be computed from the time of eviction, and to include the then value, even when the title has totally failed, and the covenant of seisin broken, cannot possibly be reconciled with that decision. I do not wish, however, to rest my opinion in this case solely upon that authority. As the question is of great importance, I am content to re-examine it at large.

What would be the rule of damages under a covenant for quiet enjoyment, if a breach of that covenant was shown which did not amount to a breach of the covenant of seisin, or if that covenant stood alone in a deed, unaccompanied with the covenant of seisin, is not a point at present before us. If, however, it stood alone in a deed, I should think, as at present advised, that upon a total failure of title, the damages would be the same as in the covenant of seisin, and no more, for the analogy is very close between that covenant and the ancient warranty. But when the covenant for quiet enjoyment follows a covenant of seisin in the same deed, the intent of the instrument, taken together, appears manifestly to be, that the one covenant is merely auxiliary to the other, as the one covenant relates to the title, and the other refers to the future enjoyment of that title. The covenant for quiet enjoyment respects the possession merely, and it would seem to be unreasonable and very inconsistent, for the plaintiff to recover under one covenant the whole value of the estate, as it was intended to be conveyed, and under another covenant in the same deed, distinct and increased damages, because he was not permitted to enjoy that estate. These covenants must be taken in connection, to ascertain their import. The covenant for further assurance is one of these secondary covenants, and if the grantor had no title, and the value of the land was recovered back by the grantee, he could not be called upon in damages for further assurance. This would be very idle when it had been ascertained by the recovery under the principal covenant that he had nothing to assure. If the grantee recovers what is to be deemed, upon established principles, the value of the land, under the covenant of title, it amounts, in effect, to a satisfaction and extinguishment of the covenants relative to the possession, and the grantee cannot receive anything more than nominal damages under those covenants. There is no precedent to authorize any greater recovery, under the covenant for quiet enjoyment than under the covenant of seisin; and the universal silence in the books on a point which so frequently gives occasion for litigation, is a strong argument to prove that no such rule exists as that contended for by the plaintiff. I believe it has never been the received opinion with us, that in a deed containing the usual covenants, viz. the covenant of title or seisin, and the covenant relative to the possession, the latter covenants, in a case of no title, and consequently of a breach of the covenant of title, would become paramount covenants and afford a larger claim for damages. The latter construction would not only introduce a rule hitherto undiscovered in the common law of England, but a rule of great moment in its immediate consequences to the community; and I must be thoroughly persuaded of the soundness of the construction, either upon authority or principle, before I can consent to adopt it. When, therefore, there is no authority for such a construction to be met with in the decisions at Westminster-Hall, and it appears to be repugnant to the natural and reasonable interpretation of the covenants, as found in connection in the same deed, I must adhere to the opinion which I gave in the case of Staats v. Ten Eyck's Ex'rs, and which must, from a view of that case, have been also the unanimous opinion of the court.

The case before us, then, resolves itself into this question, What is the extent of the rule of damages on a breach of the covenant of seisin?

Three points are submitted by the case: (1) Whether the plaintiff can recover interest on the consideration paid? (2) Whether he can recover for the increased value of the land? And (3) whether he can recover for his beneficial improvements?

The two first points were settled in the case of Staats v. Ten Eyck's Ex'rs, and need not again be examined. Nothing has been shown which affects the accuracy of that decision on those points, and it deserves notice as being of great weight in support of that decision, that in the states of Massachusetts and Pennsylvania, the same rule of damages is established in an action for the breach of the covenant of seisin. The third point was reserved in the consideration of the former case, and no opinion expressed upon it. It, therefore, remains open for discussion.

I must own that I never perceived any ground for a distinction as to the damages, between the rise in the value of the land, and the improvements. There is no reason for such a distinction, deducible from the nature of the covenant of seisin. Improvements made upon the land were never the subject-matter of the contract of sale, any more than its gradual increase or diminution in value. The subject of the contract was the land as it existed, and was worth when the contract was made. The purchaser may have made the purchase under the expectation of a great rise in the value of the land, or of great improvements to be made by the application of his wealth, or his labor. But such expectations must have been confined to one party only, and not have entered as an ingredient into the bargain. It was the land and its price, at the time of the sale, which the parties had in view, and to that subject the operation of the contract ought to be confined. The argument in favor of the value of the land, and the improvements as they exist at the time of eviction, has generally excepted cases of extraordinary increase, and of very expensive improvements. It seems to have been admitted, that, without such a limitation to the doctrine, it could not be endured. But this destroys every thing like a fixed rule on the subject, and places the question of damages in a most inconvenient and dangerous uncertainty. We have a striking illustration of this in the French law. The rule in France, upon bona fide sales, according to Pothier, Traité du Contrat de Vente, No. 132 to No. 141, is to make the seller, on eviction of the buyer, refund not only the original price, but the increased value of the land, and the expense of the meliorations made. He admits, however, that the intention of the parties is to be the rule in the assessment of damages, and that, in the case of an immense augmentation in the price of the land, or in the value of the improvements, the seller is to answer only for the moderate damages which the parties could be supposed to have anticipated when the contract was made. It is plainly to be perceived, that there is no certainty in such a loose application of the rule, and that it leaves the damages to an arbitrary and undefined discretion, and so it appears to have been understood; for in the "Institution au Droit François," by M. Argou (livre 3. c. 23), it is laid down, that "the question of damages, beyond the price paid, is with them very arbitrary." This is not consonant to the genius of our law, nor does it recommend itself well for our adoption. On a subject of such general concern, and of such momentous interest, as the usual covenants in a conveyance of land, the standard for the computation of damages, upon a failure of title (whatever that standard may be), ought, at least, to be certain and notorious. The seller and the purchaser are equally interested in having the rule fixed. I agree, that the contract is to be construed, according to the intention of the parties; but I consider, that the intention of the covenant of seisin, as uniformly expounded in the English law, is only to indemnify the grantee for the consideration paid. This was the settled rule at common law, upon the ancient warranty, of which this covenant of seisin is one of the substitutes; and all the reasons of policy which prevent the extension of the covenant to the increased value of the land, apply equally, if not more strongly, to prevent its extension to improvements made by the purchaser. A seller may be presumed, at all times, able to return the consideration which he actually received; but to compel him to pay for expensive improvements, of the extent of which he could have made no calculation, and for which he received no consideration, may suddenly overwhelm him and his family in irretrievable ruin. The common law never left the vendor in such a state of uncertainty; and it made no distinction between the natural rise of the land, and its increased value, by buildings, or other improvements. The feoffor was still to answer only for the value of the land, as it was worth when the feoffment was made. This was the amount of the decision in Yearbook 30 Ed. III. p. 14b. A man had a warship, and granted it over, with warranty, and, afterwards, the grantee was impleaded, and vouched the grantor. Now the wardship was of more value at the time of the voucher, than it was at the time of the grant, with warranty, by reason of other lands descending, afterwards, or by buildings or otherwise, and it was held, that the vouchee could take protestation of this matter when he entered into the warranty; i. e. when he was admitted to defend, instead of the original tenant. And Burton laid this down for law, that if land be better after the feoffment made by buildings or otherwise, he who receives in value, receives but according as the land was worth at the time of the feoffment, and not more. The same rule was laid down for law by Newton, J., in Yearbook 19 H. VI. p. 46a; and again, in 61a, and he says that it had been so adjudged, and he refers to the decision in 30 Ed. III. which he said was not controverted. This rule, upon the sanction of these authorities, has been incorporated, as good law, into the Abridgments of Fitzherbert, Brooke, and Rolle. But the case of Ballet v. Ballet, Godb. 151, in the time of Jac. I., is a much more modern determination upon the same point. That was a case of a writ of warrantia chartæ, and, upon demurrer, the court held, that if there be new buildings, of which the warranty was demanded, which were not at the time of the warranty made, and the deed is shown, the defendant ought not to demur, but to show the special matter, and enter into the warranty for so much as was at the time of the making of the deed, and not for the residue. Indeed, the point is too clear to admit of doubt, that the increased value of the land by buildings or other improvements, made no alteration, at common law, in the rule of damages; and for the reasons given in the former case of Staats v. Ten Eyck's Ex'rs, it can make no alteration in the covenant of seisin, which, as to the rule of compensation, is commensurate only with the ancient warranty.

I am, therefore, of opinion, in this case, that the sum allowed for the increased value of the land, and the sum allowed for improvements, be deducted from the verdict, and that judgment be entered for the residue only.

THOMPSON and YATES, JJ., concurred.

Judgment accordingly.

BROOKS v. BLACK.

(8 South. 332, 68 Miss. 161.)

Supreme Court of Mississippi. Nov. 10, 1890.

Appeal from chancery court, Noxubee county; T. B. GRAHAM, Chancellor.

G. A. Evans and *Brame & Alexander*, for appellant. *Bogle & Bogle*, for appellee.

COOPER, J. This is a proceeding by attachment in chancery by the appellee, Black, against his remote vendor, Brooks, to recover damages for the breach of warranty of title to certain lands. In 1869, Brooks conveyed the land, with covenants of warranty, to one Spencer, the consideration being the sum of $6,296. Spencer executed a deed of trust, with power of sale, to one Smith, to secure the payment of a debt of $400 to Graham, Black & Co. In September, 1878, the debt secured being unpaid, the land was sold, as provided by the trust-deed, and at such sale Black, the appellee, became the purchaser, at the price of $1,000. After his purchase, Black conveyed to Mrs. Spencer an undivided one-half interest in the land. Afterwards, the heirs at law of Mrs. Caroline Daves and Mrs. Neilson recovered in ejectment from Black and Mrs. Spencer the undivided one-half interest in the land, claiming under title paramount to that of Brooks. Brooks was not notified of the pendency of this action of ejectment. Black, by the result of that suit, having lost the one-half of his half interest in the land, (the one-fourth of the whole,) seeks by the present proceeding to recover from Brooks one-fourth of the consideration paid him by Spencer, and interest thereon, and the costs of defending the action of ejectment against the heirs of Daves & Neilson, including attorney's fees. The chancellor found as facts that the title of the heirs of Mrs. Daves and Mrs. Neilson was paramount to that of Brooks; that the value of the land at the time of eviction was $6,000; and that Black, in good faith, and in discharge of a legal duty, had defended the action of ejectment, and in so doing had expended in court costs the sum of $249.91, and the further sum of $200 for attorney's fees, which were reasonable. Upon these facts, he decreed that Brooks should pay to Black the sum of $1,500, the same being the actual value of the land lost by Black, and less than one-fourth of the purchase price paid to Brooks by Spencer, with interest at 6 per cent. from January 1, 1888, the date of Black's eviction, and also the said sums of $249.91 and $200, the court costs and attorney's fees, with interest thereon from the commencement of this suit. Brooks appeals and assigns for error (1) that the court should have not made any decree against him, because the facts proved show that the debt secured by the deed of trust from Spencer to Smith, trustee, had been paid at and before the sale under said deed; (2) that the measure of damages should be the one-fourth of the purchase price paid by Black, and not the one-fourth of the value of the land at the time of eviction, nor the one-fourth of purchase money received by Brooks; (3) the court should not have allowed the court costs expended in defending the action of ejectment; (4) the court should not have allowed attorney's fee paid in defending said action.

It is sufficient to say, in reference to the first assignment of error, that the facts do not support appellant's contention.

The second assignment of error presents an interesting question which has never before been considered by this court, and, so far as our researches have led, has not often arisen in other states. That question is, what is the measure of damages, in a suit by an evicted vendee, upon the covenant of warranty of a remote vendor, running with land? May he recover the purchase price received by the remote vendor, or is he limited by the consideration he himself has paid? It is supposed by counsel for the appellant that the sum paid by the evicted party—the value of the land at the time of his purchase—is fixed as the measure of damages in this state by the case of White v. Presly, 54 Miss. 313. But the question was not raised by the record in that case; and although CHALMERS, J., in delivering the opinion of the court, declares that the sum paid by the evicted party, with interest, the same being less than the sum received by the remote vendor, is a correct measure of damages, the declaration does not thereby become decisive. In that case, Huntington had sold land to one Jones, from whom the title had passed under execution sale to Pressly. Pressly lost the land by reason of title paramount to that of Huntington, and sued Huntington's administrator on the covenants of warranty, and recovered in the court below the sum he had paid at execution sale, and interest thereon, the same being less than Huntington had received. The administrator appealed. He, as appellant, could not assign as error the fact that damages less than should have been awarded had been given; nor could the appellee raise the point here, that the judgment he sought to maintain should have been for a greater sum. The observation of the judge was not upon any question sought to be raised, or which could have been decided, and therefore is not the decision of the court. Among the first cases in which the liability of a vendor to his vendee for breach of the warranty for quiet possession was considered were Staats v. Ten Eyck, 3 Caines, 112, and Pitcher v. Livingston, 4 Johns. 1. It was contended for the plaintiffs in these cases that the covenant was one of indemnity, and therefore that the measure of damages should be the value of the land at the time of the breach. In Staats v. Ten Eyck, recovery was sought for the appreciation in the value of the land above the price paid by natural causes, and in Pitcher v. Livingston to recover above the purchase price the value of permanent improvements put upon the land by the vendee. The argument for the plaintiffs was rested upon the rule of damages in breaches of personal covenants in other instances, but the court rejected the contention, and adopted, by analogy, the measure of damages applied in the common-law action of *warrantia chartæ*, and in suits for the breach of the covenant of seisin, viz., the value of the land, determinable by the price paid the vendor; and, since the vendee was liable to the real owner for mesne profits, he was also entitled to interest on the purchase money for the time for which such mesne profits might be recovered against him. The measure of damages established in these cases has been so generally adopted in other states as to have become almost universal, and it would be superfluous to cite authorities in its support. It has been announced as the rule in this state. Phipps v. Tarpley, 31 Miss. 433. We refer to the cases above not for the purpose of announcing the rule which applies as between vendor and vendee, for that is too well settled to admit of controversy, and is conceded by counsel for appellant; we note them to show that the suggestion now made that the covenant is one of indemnity was rejected by the court in the earliest cases. In a certain sense, all "covenants" are for indemnity; but the sense in which the word is now used, in argument of counsel, that redress is to be afforded to the extent, and within the limit, of the actual loss sustained by the vendee, in an action against his immediate vendor, it may be confidently asserted, is against the overwhelming current of authority. In these cases, at least, the decisions are practically uniform that, regardless of the value of the land at the time of eviction, the recovery is measured by the value of the land at the time of the conveyance, which value is conclusively fixed by the price paid by the vendee or received by the vendor. Another proposition may be confidently stated as supported by an equally uniform current of authority, that the covenant for quiet enjoyment runs with the land, and passes to all subsequent owners claiming in the chain of title. The purchaser of land gets, by operation of law, not only the land, but also the covenant of the first vendor, and that as well where the covenant is by its words to the vendee only, as where it is with him and his assigns. When we come however to the precise question now presented, which is whether a remote vendee may recover from the remote vendor the purchase money paid by the first vendee, or is limited to the amount paid by himself to his vendee, we find direct conflict in the decisions, and, so far as we have found the cases, they are nearly equal in number on each side. In North Carolina, (Williams v. Beeman, 2 Dev. 483,) Minnesota, (Moore v. Frankenfield, 25 Minn. 540,) Tennessee, (Mette v. Dow, 9 Lea. 93; Whitzman v. Hirsh, 87 Tenn. 513, 11 S. W. Rep. 421,) and Maryland, (Crisfield v. Storr, 36 Md. 129,) it is held that such remote vendee can only recover what he has paid to his own vendor. On the other hand, it is held in South Carolina, (Lowrance v. Robertson, 10 S. C. 8,) Iowa, (Mischke v. Baughn, 52 Iowa, 528, 3 N. W. Rep. 543,) and Kentucky, (Dougherty v. Duvall, 9 B. Mon. 57,) that such vendee may recover the full consideration received by the defendant, the remote vendor. Williams v. Beeman was decided by a divided court, RUFFIN, J., dissenting, and Mette v. Dow (followed by Whitzman v. Hirsh) overruled Hopkins v. Lane, 9 Yerg. 79. In Crisfield v. Storr, 36 Md. 129, the court declares that it had carefully examined many authorities upon the point, and that the decided weight of authority was that the plaintiff could not recover on the warranty of a remote vendor more than he had himself paid to his immediate vendor, and in support of this declaration cites the following cases: Booker v. Bell's Ex'rs, 3 Bibb, 175; Kelly v. Dutch Church, 2 Hill, 116; Bennet v. Jenkins, 13 Johns. 51; Hanson v. Buckner, 4 Dana, 253; Wyman v. Ballard, 12 Mass. 304; Stewart v. Drake, 9 N. J. Law, 142; Wilson v. Forbes, 2 Dev. 39; Pitcher v. Livingston, 4 Johns. 1. We have examined these cases, and find all of them, except Kelly v. Dutch Church, to be suits by the immediate vendee, or his heirs at law, against the immediate vendor, or his personal representative. Kelly v. Dutch Church was a suit by the assignee of the lessee against the lessors of his assignor. The trial court had awarded, as damages, the rent reserved in the lease; thus, as it seems to us, making the sum paid to the lessors, and not that paid for the assignment, the measure of damages. But the facts are not very clearly stated, and the case cannot be held to decide anything upon the point. The question seems to have been more fully examined upon principle in the cases of Williams v. Beeman, 2 Dev. 483; Mette v. Dow, 9 Lea, 93, and Lowrance v. Robertson, 10 S. C. 8, than in any others. In Williams v. Beeman, the majority of the court thought that the remote vendee was suing to recover his own damages, and not those of the first vendee, and therefore should be restricted to the actual damages he had sustained. In Mette v. Dow, the court compared the covenant to a penal bond, the recovery on which would be limited to the actual damages sustained by the party suing. The dissenting opinion of RUFFIN, J., in Williams v. Beeman, is, in our opinion, a complete reply to this position. He says: "The value at the time of the sale by the first vendor is the measure prescribed. It ought to operate both ways. If the vendor be not liable for more, he ought not to be for less. I understand it to be admitted that, if his immediate vendee be evicted, he is still liable for that. I do not see why he should not be equally so to the assignee as his vendee. Does the assignment change his covenant? It runs with the land, and he who buys the land buys the covenant. He gets the whole of it. But it is said that the assignor in such case cannot recover from the first vendor more than the evicted vendee gave for the land, because this is all the assignor would be obliged to pay the assignee, and therefore he has complete indemnity. This is changing the rule essentially. It puts it upon the amount of the loss, not the price paid. It would seem to me that whoever buys land with a covenant adhering to it takes it with all the advantages it conferred on his assignor. It is so in personal contracts, for we do not inquire what the assignee of a bond gave for it. The obligor must pay him the whole." This argument seems to us unanswerable. It at least never has been answered in any case we have seen When it is conceded that, by his covenant, a vendor binds himself to return the purchase price he receives in the contingency of a failure of the title conveyed, and that this obligation is assigned, by operation of law, to whoever may succeed to the title, it would seem to follow, as a corollary, that the recovery, by whomsoever had, ought to be equal to the obligation. But, under the rule announced in Maryland, Minnesota, Tennessee, and North Carolina, the obligation of the covenantor is variable, and dependent upon transactions with which he is not connected. In these states, a man selling an estate to A. for $5,000 would be liable to pay A. that sum if he should be evicted. But if A. sells the same land to B. for $500, the liability of the first vendor is reduced to that sum, and thus B., the purchaser from A., gets less than the obligation A. held. But if B. sells to C. for $5,000, the original obligation revives, and the absurdity is presented of B.'s failing to get, and therefore to have, what A. owned, and still transferring to C. that which he never had. The rule announced in Kentucky, Iowa, and South Carolina is not only commended by its justice, and by analogy to other well-settled principles, but possesses the advantage of stability and uniformity. As we have said, it is quite generally held that, by the covenant for quiet enjoyment, the grantor binds himself to pay, in event of failure of title, the then value of the land, which value is determined by the price paid. Appreciation by natural causes, or by improvements put upon the property by the vendee, does not enlarge his liability; nor is it decreased by depreciation in value from any cause. By legal intendment the obligation is as though the covenantor should say to the covenantee: "You, or the person succeeding to the title I convey, shall hold the land, or if you cannot, by reason of title in another, the money I have received shall be restored in lieu of the land." We are unable to perceive any principle upon which this obligation shall be diminished because of the price, in consideration of which it may be assigned. We therefore conclude that the obligation of the covenantor is the same to the assignee that it was to the covenantee, and, being such, is governed by the same measure of damages.

The third and fourth assignments of error present the question whether taxed costs and attorney's fees in excess of the purchase price, and interest thereon, may be recovered on the covenant. We are unable to discover any just principle upon which costs, whether taxed or otherwise, have been allowed to plaintiffs over and above the purchase price received by the covenantor, and interest thereon. We readily perceive the justice of the rule by which the value of the land at the time of the sale by him is accepted as the measure of the liability of the covenantor, and also that the price paid shall be taken as conclusive evidence of that value. We also appreciate the fairness of allowing interest on the purchase money as compensation to the covenantee for so long a time as he has been held liable to the owner for mesne profits. But why costs in excess of the purchase money and interest have ever been allowed we cannot conjecture. In 4 Kent, Comm. p. 476, it is said: "The measure of damages on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs." How costs, which are uncertain in amount, varying with reference to the character of the suit, the number of witnesses, and the nature of the issues presented in a proceeding, could ever have been supposed to furnish any light upon the past value of lands, passes our comprehension. But so it is that, by practically an unbroken current of authority, the rule has been established that they may be recovered in addition to the purchase price and interest. Rawle, Cov. c. 9; Suth. Dam. 302; 4 Amer. & Eng. Enc. Law, 566. Believing that the rule allowing any costs should never have been established, we decline to extend it beyond the limits of the taxed costs of the case. Attorney's fees have been allowed in some states, and disallowed in others. The conflict in these decisions will be found in the cases cited by the text writers, and the Encyclopedia, above referred to. Constrained by authority to allow the taxed costs, we return to correct principles at the first point at which we may do so, and hold that the attorney's fees paid by the covenantee are not recoverable on the covenant of the grantor. In this cause, the court allowed the defendant an attorney's fee which, added to the taxed costs and other damages, exceeded the value of the land at the time of the sale, and interest thereon, and taxed costs. But, since the court also erred in fixing the value of the land at $6,000, its value at the time of eviction, instead of $6,296, the price paid to the defendant, both errors must be corrected to make a proper result. The decree is reversed, and decree here.

GUTHRIE v. RUSSELL et ux.

(46 Iowa, 269.)

Supreme Court of Iowa. June 14, 1877.

Appeal from district court, Jasper county. Suit in equity by one Guthrie against James H. Russell and wife to recover the amount plaintiff had been compelled to pay to satisfy mortgage on lands conveyed to plaintiff by defendants, with covenant of warranty against incumbrances. Judgment for plaintiff, and defendants appeal. Reversed.

J. N. Lindley and R. A. Sankey, for appellants. Ryan Bros., for appellee.

ADAMS, J. In this case the deed containing the covenant sued on conveyed an interest which was paramount to the incumbrance. That interest, it appears, was of the value of $1,481.57. The amount necessary to be paid by the junior incumbrancer to redeem was $1,681.57, but that covered improvements made by the plaintiff. What the plaintiff bought of the defendants was worth, according to the evidence, about $200 less. The plaintiff then paid $1,200, and acquired an interest paramount to all others, worth $1,481.57. To extinguish an incumbrance junior to it, he paid, as we will assume, $378, or gave property of that value, and he now claims to recover that amount from his covenantors.

Where real estate is conveyed with covenants of warranty, it has been held in actions for breach of covenant that the price paid by the purchaser and received by the seller should be taken, as between them, to be the value of the property. In Baxter v. Bradbury, 20 Me. 260, the court said: "If the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser the consideration paid, which is the agreed value of the land, and interest." In Brandt v. Foster, 5 Iowa, 295, it was said: "The measure of damages for breach of this covenant is the consideration money and interest, upon the ground that this is the actual loss." In Field on Damages (section 461) the author says: "In an action for the breach of the modern covenant of warranty, the general rule of damages in this country, in the absence of fraud, is the value of the land at the time of the execution of the deed, of which the actual consideration is conclusive evidence."

In the state where this rule prevails, it is held in actions for breach of covenants against incumbrances that the damages must be limited to the amount of purchase money and interest, although the amount paid to remove the incumbrance might be much greater, the value of the property as between the parties being taken to be the consideration paid for it.

But, in Knadler v. Sharp, 36 Iowa, 232, this court ignored the doctrine that the consideration paid is to be taken as the value of the property as between the parties. In that case, the court aimed to give full compensation, thus following, to some extent, the rule adopted in Massachusetts and some other states, where the limit of recovery in an action for breach of covenant is the actual value of the property at the time of eviction, or at the time of the extinguishment of the incumbrance. Yet, we cannot think that the court designed to depart altogether from the other rule above set forth, which is in accordance with the decided weight of authority, and which was expressly held by this court, as we have seen, in Brandt v. Foster. We have no doubt that if, in Knadler v. Sharp, the incumbrance paid off had exceeded the purchase money and interest, the plaintiff would have been limited in his recovery to that amount.

Under the decisions, then, of this court, the limitation imposed upon the covenantee's recovery must be regarded as placed more upon the ground that the conevantor needs that protection than upon the ground that the consideration paid is fairly the limit of compensation.

In Staats v. Ten Eyck's Ex'rs, 3 Caines, 111, Mr. Justice Livingston said: "To find a proper rule of damages in a case like this is a work of some difficulty. No one will be entirely free from objection, or will not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may also be attended with injustice if not with ruin."

Proceeding then upon the rule, as indicated in Knadler v. Sharp, that the covenantee is entitled to full compensation, subject only to the limitation needed by the covenantor for his just protection, we come to inquire whether it will enable the plaintiff to recover. If the premises were of such value that he could better afford to pay the amount which he did and retain them than suffer a redemption and eviction, he was, we think, justified in doing so, and ought to be allowed to recover of the defendant notwithstanding he received and retains an interest paramount to the incumbrance of greater value than the amount which he paid for that interest. Further than that we think that law would not justify us in going. It should always appear that the amount paid by the covenantee was fairly paid, or that the incumbrance, if not removed, was one which substantially affected the value of the property. Grant v. Tallman, 20 N. Y. 191.

The question then arises: Were the premises of greater value than the amount which the plaintiff would have received upon redemption before eviction? The amount necessary to redeem had come to be nearly $2,000. The amount paid by plaintiff to the defendant was $1,200. As between the parties, we think that the consideration paid should be taken to be at least prima facie evidence of the value. If the plaintiff claims to recover upon the ground that they were worth, not only more than that, but more than the amount which he would have received upon redemption, he should have shown it in evidence. We are not satisfied that the amount paid was fairly paid. If the premises were really not worth redeeming, in other words if the incumbrance paid off was really of no value, there is ground for suspecting that there was collusion between the plaintiff and incumbrancer. Possibly the plaintiff would have been justified in paying something for the extinguishment of the incumbrance, even if it had no value, but in such case it would be incumbent upon him to show that the amount paid was reasonable. We cannot regard the defendants' covenant as extending further than that.

It may be said that this rule does not afford the plaintiff complete protection,—that possibly the incumbrancer was unreasonable; but it should be borne in mind that the plaintiff bought with constructive notice of the incumbrance. If he was unaware of its existence it was his own fault. Perhaps it would be fair to presume that he bought with reference to it. At all events, it seems clear to us that while holding an interest under his deed of greater value than he paid for it, he cannot properly claim the right to pay an unreasonable amount to remove the incumbrance and to recover the amount thus paid of the defendants.

In Knadler v. Sharp, it seems to have been taken for granted that the amount paid was reasonable. There is, therefore, nothing in the decision in that case which necessarily conflicts with this. Reversed.

POPOSKEY v. MUNKWITZ.

(32 N. W. 35, 68 Wis. 322.)

Supreme Court of Wisconsin. March 1, 1887.

Appeal from circuit court, Milwaukee county.

The action is by a lessee against his lessor for failure of the latter to give the lessee possession of the leased premises according to the covenants in the lease. Under date of October 22, 1884, the parties executed an indenture of lease in and by which the defendant leased to the plaintiff his store, No. 411 Broadway, in the city of Milwaukee, from November 15, 1884, to May 1, 1890, at a yearly rent therein reserved, and therein covenanted that, on paying such rent, and performing the conditions contained in such lease to be performed by him, the plaintiff should have the quiet and peaceful possession of the leased premises during such term. The defendant was unable to give the plaintiff the possession of the leased store because he had theretofore leased the same to Wilde & Uhlig for three years, commencing May 1, 1883, and Uhlig was lawfully in possession thereof under such lease when the plaintiff's term under his lease commenced, and so continued in possession thereafter. The plaintiff paid the defendant rent until December 1, 1884, at the execution of the lease, being $41.67, as stipulated in the lease, and performed all his covenants therein contained. The plaintiff also put some goods in the store with the consent of the defendant, but was required by Uhlig to take them away. This involved an expenditure by the plaintiff of $14.40. It is averred in the complaint that, for 12 years before the making of the lease first above mentioned, the plaintiff had carried on, in the city of Milwaukee, and for the last five years in the vicinity of the leased store, a wholesale and retail business in pictures, picture-frames, and artist's materials, and in manufacturing picture-frames, and had a very large and lucrative custom and patronage established in said business; that he leased the store No. 411 Broadway for the purpose of carrying on and continuing the same business therein, of which the defendant had notice; that such store was especially well located, and adapted to the requirements of plaintiff's said business; that, relying upon having possession of the leased store at the stipulated time in which to carry on his business, he purchased a large stock of goods adapted to the holiday trade, in December, which is the most profitable trade during the year; and that he lost this trade by reason of his failure to obtain possession of the store. Also that, upon the refusal of the defendant to give him possession of the store, the plaintiff diligently endeavored, but without success, to obtain another store, suited to the requirements of his business, and that the rental value of the leased store for the term of the lease is at least $2,000 more than the rent thereof reserved in the lease. The closing paragraph of the complaint is as follows: "That, by reason of the premises, plaintiff's said business has been broken up and destroyed, and his trade and custom gone, and his stock of goods purchased to carry on his business at said store so leased has become greatly depreciated and destroyed in value, and plaintiff has lost the profits which he would and could have made in continuing and carrying on his aforesaid business at said leased premises since said fifteenth day of November, 1884, had said leased premises been surrendered and delivered up to him as agreed by defendant, and his said leasehold interest in said premises been lost and destroyed, to the damage of plaintiff in the sum of five thousand dollars." Judgment for $5,000 and costs is demanded. The answer denies in detail each of the above averments, except that the defendant owned the store No. 411 Broadway, and executed a lease thereof to the plaintiff as alleged in the complaint.

The controversy on the trial was confined to the question of damages. The plaintiff offered testimony for the purpose of proving the special damages stated in the complaint, but the same was rejected, and the judge held that the measure of the plaintiff's damages is the difference between the rent reserved in the lease and the actual rental value of the store, together with the expense of removing the plaintiff's goods (before mentioned) from the store after the term of the lease commenced, and confined the testimony to those elements of damages. Only a single question was submitted to the jury, which is as follows: "What was the actual value per annum of the premises 411 Broadway, Milwaukee, described in the lease from defendant to plaintiff, from and after November 15, 1884?" The jury answered $1,200. The rent reserved in the lease until May 1, 1887, is $1,000, and $1,200 thereafter. On April 5, 1886, the court gave judgment for the plaintiff for $272.14 damages, and for costs of suit. It is recited in the order for judgment that the plaintiff admitted he went into possession of the leased store March 1, 1886. It is understood that the judgment is made up of $200 per annum (being the excess in the value of the rent as found by the jury, over and above the rent stipulated in the lease) from November 15, 1884, to March 1, 1886, and the item of $14.40 above mentioned. The item of $41.67 paid defendant on account of rent was disallowed for the reason (as stated by the court) that the lease to plaintiff "assigned, by operation of law, the premises during Uhlig's term to Mr. Poposkey, and he has the right to recover the rent from Mr. Uhlig." The plaintiff appeals from the judgment.

Dey & Friend, for appellant. Jenkins, Winkler, Fish & Smith, for respondent.

LYON, J. This action was brought to recover damages for the failure of the defendant to put the plaintiff in possession of the store No. 411 Broadway, Milwaukee, leased by the former to the latter, at the time stipulated in the lease as the commencement of the term. It is substantially an action for a breach of the covenant for quiet enjoyment contained in the lease. 1 Tayl. Landl. & Ten. § 309. This appeal presents for determination the question, what is the true rule of damages for a breach of that covenant in that case, in view of the facts proved and offered to be proved therein? The rule is undoubtedly the same as in an action for a breach of covenants for title in an absolute conveyance; that is to say, had the plaintiff purchased the store No. 411 Broadway of the defendant, and taken an absolute conveyance thereof, instead of a lease for five or more years, under the same circumstances which existed when the lease was executed, the measure of his damages for a breach of the covenants for title in such conveyance would be the same that it is for a breach of the covenant for quiet enjoyment in the lease. 3 Suth. Dam. 147; Blossom v. Knox, 3 Pin. 262. Indeed, the covenant for quiet enjoyment is one of the covenants for title in a conveyance. Rawle, Cov. 17. It is also said to be "an assurance consequent upon a defective title." Id. 125.

The general rule of damages which obtains in England and many of our sister states for a breach of covenant for title was first authoritatively laid down in 1775, in the case of the common pleas of Flureau v. Thornhill, 2 W. Bl. 1078. The defendant covenanted to sell the plaintiff a rent for a term of years issuing out of leasehold premises, but, without fault on his part, the defendant was unable to make good title thereto. The plaintiff claimed damages for the loss of his bargain, but it was held that he was not entitled thereto. De Grey, C. J., said: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." The rule of the above case has been much considered in both England and this country; and while its scope has been more clearly defined, and its application somewhat limited by later adjudications, the rule itself, as applied to cases in which the vendor honestly believed he had a good title, but the title failed for some defect not known to him, and of which he was not chargeable with notice, is now firmly established in the jurisprudence of England by the judgment of the house of lords in Bain v. Fothergill, L. R. 7 Eng. & Ir. App. 158. As already observed, the rule prevails in several of the United States, including this state, under the limitations just mentioned, of good faith and excusable ignorance of the vendor of defects in his title. Indeed, these are scarcely limitations, but rather an interpretation of the qualification "without fraud," in the opinion by De Grey, C. J., in the principal case. The rule as it now stands has been applied in this state in Rich v. Johnson, 2 Pin. 88; Blossom v. Knox, 3 Pin. 262; Nichol v. Alexander, 28 Wis. 118; Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6, and in other cases.

Under this or any other rule, the plaintiff is entitled to recover the consideration paid by him on account of the purchase. Hence, in the present case, whatever may be the measure of damages, the plaintiff should have recovered the amount he advanced for rent, and interest thereon. The reason given by the circuit judge for excluding this amount from the plaintiff's recovery, to-wit, that he could recover the rent from Uhlig, the tenant under the paramount lease, is conceived to be unsound. The plaintiff did not purchase a term subject to the lease of Uhlig, but an absolute term; and while he might, perhaps, have treated his lease as an assignment of the rents accruing under the prior lease, and collected the same from Uhlig, there is no rule of law which compels him to do so. Indeed, had he done so, it possibly might have operated as a waiver of any claim for damages for the breach of the covenant sued upon.

The limitations of the rule of Flureau v. Thornhill, or rather the exceptions thereto, are well stated in 3 Suth. Dam. 149, as follows: "Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which such lessor assumes to grant; where he refuses, in violation of his agreement, to give a lease, or possession pursuant to a lease, having the ability to fulfill, as well as where the lessor evicts his tenant,—he is chargeable with full damages for compensation, and the doctrine of Flureau v. Thornhill has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages. Where the lessee is deprived of the possession and enjoyment under such circumstances, the lessor is either guilty of intentional wrong, or he has made the lease, and assumed the obligation to assure the lessee's quiet enjoyment, with a culpable ignorance of defects in his title, or on the chance of afterwards acquiring one. In neither case has he any claim to favorable consideration; and he is not excused, on the doctrine of Flureau v. Thornhill, from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term." This quotation doubtless contains a correct statement of the law acted upon in all the states, as well in those which have adopted the rule in Flureau v. Thornhill as in those which have not.

We are clear that this case comes within the exceptions. When the defendant leased the store to the plaintiff, he knew that there was a valid paramount lease upon the premises, executed by himself to Wilde & Uhlig, having 17 or 18 months to run after the commencement of the plaintiff's term. There is no claim that the former lessees had forfeited their lease. Indeed, the defendant afterwards made an unsuccessful attempt to evict them by legal proceedings for an alleged breach of the covenants of their lease, occurring after the execution of the plaintiff's lease. But it was held there was no breach. Munkwitz v. Uhlig, 64 Wis. 380, 25 N. W. 424. These proceedings are in evidence. Hence the defendant knew, when he leased the store to the plaintiff, of a defect in his title which prevented him from assuring to the plaintiff the quiet enjoyment of the leased premises. He thus entered into the contract on the chance of being able afterwards to avoid, in some way, his lease to Wilde & Uhlig, but having no legal cause for avoiding it. These facts deprive him of the protection of the rule in Flureau v. Thornhill, and bring the lease within the rule above quoted from Sutherland. In other words, the case is thus brought within the general rule which prevails in actions for breaches of contracts, that the plaintiff shall recover the loss he has proximately sustained by reason of the breach.

But, in order to determine what elements of loss come within the general rule, it is necessary to apply other rules of law to the particular case. In the present case (perhaps in most cases) the rules laid down in the leading case of Hadley v. Baxendale, 9 Exch. 341, 26 Eng. Law & Eq. 398, which have many times been approved by this court, are sufficient. Shepard v. Milwaukee Gaslight Co., 15 Wis. 318; Hibbard v. W. U. Tel. Co., 33 Wis. 558; Candee v. W. U. Tel. Co., 34 Wis. 471; Walsh v. Chicago, M. & St. P. R. Co., 42 Wis. 30; Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129; Brown v. Chicago, M. & St. P. R. Co., 54 Wis. 342, 11 N. W. 356, 911; Cockburn v. Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; McNamara v. Clintonville, 62 Wis. 207, 22 N. W. 472; Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. R. Co., 62 Wis. 642, 22 N. W. 827; see, also, Richardson v. Chynoweth, 26 Wis. 656. See, also, a very learned and elaborate note on the rule in the principal case, in which a great number of cases are cited and discussed, in 1 Sedgw. Dam. 218–234. These rules can best be stated by a quotation from the opinion in the principal case by Alderson, B. He says: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Another rule having its foundation in natural justice should here be stated. In any case of a breach of contract the party injured should use reasonable diligence, and make all reasonable effort, to reduce to a minimum the damages resulting from such breach. The necessary expenses incurred by him in so doing may be recovered in an action for such breach. This rule was early laid down by this court in Bradley v. Denton, 3 Wis. 557, and has been followed since. For a full statement of the rule, and references to numerous adjudications sustaining it, see 1 Suth. Dam. 148. Under this rule, when the plaintiff was informed that the defendant could not give him possession of the store as he had covenanted to do, (which information was received by the plaintiff November 7th, being eight days before the commencement of his term,) it became his duty to use all reasonable efforts to procure another suitable place in which to carry on his business if the damages which otherwise would result from the breach of the defendant's covenant would be thereby diminished. We do not think, however, the plaintiff could be lawfully required to take another store out of the vicinity in which he was doing business when he took the lease from the defendant. By removing to a remote part of the city, he might, and probably would, to some extent at least, have lost the good-will of his business, which it is alleged he had carried on successfully for a series of years in the vicinity of the store No. 411 Broadway. Neither was he required to take another store not reasonably well adapted to his business.

From the foregoing rules, and the partial application of them already suggested, we think the following propositions are established: (1) The plaintiff is entitled to recover the sum he paid as rent when the lease was executed, and interest thereon; and also the necessary expense of removing some of his goods to the store, with defendant's consent, and taking them therefrom after he failed to get possession of the store. (2) If the defendant did not know, when he executed the lease, the purposes for which the plaintiff hired the store, or the uses to which he intended to put it, the measure of the plaintiff's damages for breach of the covenant for quiet enjoyment (in addition to the special damages just mentioned) would be that adopted by the trial judge; that is, the difference between the rent reserved in the lease and the actual rental value of the store, without regard to what it is used for, which the jury found to be $200 per annum. All these are natural and proximate damages resulting from the breach. (3) If the defendant, then, knew that the plaintiff was carrying on the business stated in the complaint, and hired the store No. 411 Broadway for the purpose of continuing the same business therein, and if, in the exercise of reasonable diligence, the plaintiff might have procured another store, reasonably well adapted to his business and in the same vicinity, that is, in a location in which he could have preserved and retained substantially the good-will of his former business, the rule of damages, in addition to the special items first above mentioned, will be the difference between the rent reserved in the lease and the actual rental value of the leased store for the purpose of carrying on such business therein. In such case the actual rental value would ordinarily be measured by the amount of rent the plaintiff would be compelled to pay for another store equally well adapted to his business. If he could obtain another store for the same rent he was to pay the defendant, or less, of course he would suffer no general damages for the defendant's breach of covenant, and his recovery in that behalf would be confined to nominal damages, in addition to the special damages first above mentioned. If, however, the expenses of removing to another store would have been greater than they would have been in removing to the store No. 411 Broadway, such excess would also be a proper item of damages. (4) If the plaintiff could reasonably have procured another suitable store for his business, he cannot recover for damages to his business, because by leasing, and continuing his business in, such other store, he might have avoided such damages. (5) But knowing that the plaintiff hired the store for the purpose of continuing his former business therein, (if he did know it,) and having executed the lease with knowledge that he could not put the plaintiff in possession of the store at the stipulated time because of his prior outstanding lease, the defendant took the risk of the plaintiff being able to procure another suitable store for his business, the inability of the latter to do so would render the defendant liable for the damages resulting to plaintiff's business by reason of the breach of covenant complained of. This is plainly within the rule of Hadley v. Baxendale, supra, because, under such circumstances, the parties may fairly be considered to have contemplated that the breach of covenant would necessarily destroy or greatly impair the value of plaintiff's business. It should be observed that, if the plaintiff recovers for damages to his business, he cannot also recover the value of his lease under the above second or third proposition, because such value is necessarily a factor in estimating the damages to the business. Smith v. Wunderlich, 70 Ill. 426, (433.) He may, however, in that case, recover the special damages mentioned in the first proposition, for these are not such factors.

It follows that the testimony which was offered by the plaintiff to show that the defendant knew, when he executed the lease to the plaintiff, that the latter was carrying on the business before mentioned in the same vicinity, and took the lease of the store for the purpose and with the intention of continuing such business therein, and that he was unable, in the exercise of due diligence, to find another store suitable for his business, was competent, and should have been received. Further, after the plaintiff makes a prima facie case entitling him to recover for damages to his business, proof should be received, under the pleadings, to show the value of such business.

We agree with with Mr. Justice Paine, in Shepard v. Gas-light Co., 15 Wis. 318, that to ascertain the value of a business an inquiry as to the profits thereof is necessary. Probable "value" and "net profits" are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts, based on prospective profits, when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover for damages to his business, the character, extent, and value of his established business when the lease was executed, and before, will furnish a guide to the jury in assessing the prospective and probable value thereof, had the plaintiff been permitted to transfer it to the store No. 411 Broadway. Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued.

It was said in argument that no case can be found which gives damages for the loss of anticipated profits, because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of Ward v. Smith, 11 Price, 19, cited by Mr. Justice Paine in Shepard v. Gas-light Co., supra, seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which, with its good-will, could have been transferred to the store No. 411 Broadway, there would be no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession, and carried on the business therein. In such case, profits would probably be too conjectural and uncertain to be the basis of a recovery. Some of the cases refer to this distinction. In Chapman v. Kirby, 49 Ill. 211, the court, in speaking of the case of Green v. Williams, 45 Ill. 206, say: "In that case the lessee had not entered upon the term, had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to determine whether there ever would be any profits, or upon which to estimate them." In the present case the offer was to prove facts which would have shown a sufficient basis to determine whether there would be profits, and upon which they might be estimated.

For the errors above indicated, the judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

COHN v. NORTON.

(18 Atl. 595, 57 Conn. 480.)

Supreme Court of Errors of Connecticut. Sept. 13, 1889.

Appeal from court of common pleas, New Haven county; DEMING, Judge.

Action by Louis Cohn against Samuel L. Norton, for damages for breach of contract to deliver possession of premises leased to plaintiff. Judgment for plaintiff. Defendant appeals.

G. A. Fay, for appellant. *R. S. Pickett*, for appellee.

CARPENTER, J. On the 18th day of August, 1885, the defendant leased to the plaintiff a store and dwelling-house, for one year from the 1st day of September, with the privilege of renewing the lease for three years, at a monthly rent of $50, payable in advance. One month's rent was paid. The defendant failed to put the plaintiff in possession. It appears that when the lease was executed the property was in the possession of one Alexander, under a prior lease, with the right to hold the same until February 1, 1890. He refused to surrender the possession. In an action to recover damages the plaintiff claimed to recover the sum of $80, amount paid to clerks for release from contracts, and the sum of $586.35, amount paid merchants to take back goods bought, and for depreciation on the goods. The defendant objected to the introduction of all evidence upon either of these claims. The court admitted the evidence, and allowed both items as damages.

Assuming that the plaintiff is correct in his claim that these were, or might have been, legitimate items of damage, still we think the testimony was objectionable, unless it further appeared that the sums paid were reasonable, and that the obligation to pay was entered into in good faith. The mere fact that the plaintiff paid them is not of itself sufficient to establish either proposition; and it does not appear that there was any other evidence tending to establish them, or either of them. If the clerks employed by the plaintiff had sustained no damage, or damage to a less amount, or if the plaintiff was under no legal obligation to pay, then the payment was unreasonable. The same is true of the money paid to the merchants. If these clerks were hired after he knew of the lease to Alexander, it can hardly be claimed that the plaintiff acted in good faith. How that was, we are not told. It appears that he had full knowledge of that lease on the 23d of August: and it is consistent with every fact found that all the clerks were subsequently hired. So, too, with respect to the purchase of the goods. Four days after the plaintiff had actual knowledge that Alexander could legally retain the possession, August 27th, he wrote the defendant as follows: "As I am now situated, I am on the fence, it being high time for me to buy goods, and I don't know what to do about it." On the same day he doubtless received the defendant's letter informing him that the prior lease had a year and five months longer to run. The evidence is strong, if not conclusive, that he purchased his goods after that. If so, in no event has he any legal or moral claim on the defendant.

But the great question is, what is the rule of damages in cases like this? Before considering that question we will briefly notice another claim that the defendant sets up, and that is, that it was the duty of the plaintiff, at his own expense, to take measures to gain possession of the property. Whatever may be the rule when a stranger wrongfully takes and holds possession, the principle contended for can have no application where a person holding rightfully under the lessor retains the possession. Nor are we prepared to sanction the claim that in this case the defendant is only liable for nominal damages. We can hardly say that a landlord who knows, or who has the means of knowing, that his property is incumbered with an outstanding lease, which may prevent his giving possession, acts in good faith in leasing unconditionally to another. We come back then to the question, what is the rule of damages? In Hadley v. Baxendale, 9 Exch. 341, the rule is laid down thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may, fairly and reasonably, be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

This rule has been criticised somewhat, as not being sufficiently definite; but we apprehend that any difficulty of that sort has necessarily arisen from the difficulty in applying the rule in given cases. It is not an easy matter, in many cases, to determine whether a given result is the natural consequence of a breach of a contract, or whether it arose from a matter which may reasonably be supposed to have been contemplated when the parties entered into the contract. Oftentimes it is a question on which men's minds may well differ. In that case the plaintiff was the owner of a steam-mill. He sent the parts of a broken shaft by the defendant, a carrier, to a mechanic, to serve as a model for making a new one. The carrier did not deliver the article within a reasonable time, by reason of which the plaintiff's mill stood still several days. In an action to recover damages the defendant pleaded by paying £25 into court. The case went to trial, and the plaintiff had a verdict for £25 more. A rule to show cause was argued, and the court promulgated the rule we have quoted. In that case it was contended that the loss of profits was the direct and natural consequence of the defendant's neglect. The court did not accept that view, but placed its decision on somewhat different grounds. The court says: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract; for, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." Thus the loss was attributed to the failure of the plaintiff to inform the defendant of the special circumstances, by reason of which he contributed to the loss; for, if the defendant had been fully informed, it may be assumed that there would have been a prompt delivery, and consequently no unnecessary loss, and because he was not so informed the court held that he was not liable for special damages. The essence of the rule seems to be that the defendant must, in some measure, have contemplated the injury for which damages are claimed. If it was the direct and natural result of the breach of contract itself, he did contemplate it; but if the injury did not flow naturally from the breach, but the breach combined with special circumstances to produce it, then the defendant did not contemplate it, and consequently is not liable, unless he had knowledge of the special circumstances. There may, however, be cases, growing out of the present methods of business, in which a promise may be implied, from the nature of the transaction, or the character of the business in which the party is engaged, to be prompt, and to use the utmost diligence in the performance of the duty undertaken. In such cases the law will not require the party to be specially informed, but will deem him to have contemplated the importance of the business, and hold him responsible accordingly.

Apply these principles to this case. The store was hired for a clothing store. That seems to be all that the defendant knew about it. He did not request the plaintiff to hire clerks and purchase goods, nor was he advised that the plaintiff would do so. While he may have supposed that the plaintiff would make suitable preparations to occupy the store, yet he could not know what preparations were necessary. He may have needed no clerks, or they may have been previously engaged, and the necessary goods may have been then in his possession. As a matter of law, it cannot be said that the defendant contemplated that the plaintiff would hire clerks and purchase goods under such circumstances as to incur heavy liabilities in case of failure for any cause. In no proper sense, therefore, was the defendant a party to those arrangements, had no interest therein, and had no right to interfere; consequently he cannot be held responsible. Again, if these liabilities were incurred after the plaintiff knew that it was doubtful whether he could have the store, as they probably were, then, as suggested in a former part of this opinion, they were incurred in bad faith, and he assumed the entire risk. The English rule, then, as we understand it, will not justify the measure of damages applied by the court below. The rule we have been considering prevails generally in this country. Closely allied to it is another principle, which has some application to this case, and that is, that profits which are in their nature doubtful or uncertain cannot be recovered as damages in such cases. But this principle does not exclude profits as such, but only those of a contingent nature. If they are definite and certain, and are lost by reason of the defendant's breach of his contract, they are in some cases recoverable. An instance of this is the case of Booth v. Rolling-Mill Co., 60 N. Y. 487. The plaintiff had contracted to deliver to a railroad company 400 steel-capped rails at a given price. The defendant engaged with the plaintiff to manufacture them, but failed to do so. The plaintiff was allowed to recover the profits he would have made had he been able to deliver the rails. If a loss of profits may thus be compensated, we see no reason why a direct loss of money may not be compensated. In either event, however, the loss must be certain, not only as to its nature and extent, but also as to the cause which produced it, and must be capable of being definitely ascertained. In Griffin v. Colver, 16 N. Y. 489, the rule is thus stated: "The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Here we may concede that the loss sustained was sufficiently definite and certain as to the amount, but not so as to the cause from which it proceeded. As we have already seen, it is not probable that the violation of the contract caused these losses; but, on the other hand, the plaintiff himself needlessly subjected himself to them.

In an Illinois case cited by the plaintiff, (Green v. Williams, 45 Ill. 206,) it was held that necessary losses sustained might be recovered. The plaintiff's case will hardly stand that test. The failure is twofold,—in respect to the necessity for hiring clerks, and purchasing goods, in the first instance, and also in respect to the payment of the sums paid. There is no finding, and the facts do not sufficiently indicate, that there was any necessity for either.

Thus far we have assumed that the damages recoverable in this case are the same as in ordinary cases of breaches of contract. The defendant, however, contends that the rule in actions on covenants in leases, express or implied, is that, where the plaintiff has paid no rent or other expense, only nominal damages can be recovered. Such a rule once prevailed. It was adopted in analogy to actions on covenants in deeds of real estate, and it now prevails to a limited extent in the state of New York. Conger v. Weaver, 20 N. Y. 140. In that case DENIO, J., not regarding the rule with favor, with apparent reluctance considered that it was too firmly established in that state to be disturbed. In Mack v. Patchin, 42 N. Y. 167, SMITH, J., says: "But this rule has not been very satisfactory to the courts in this country, and it has been relaxed or modified more or less, to meet the injustice done to lessees in particular cases." In Pumpelly v. Phelps, 40 N. Y. 59, it is declared that the rule should not be extended, but limited strictly to those cases coming wholly and exactly within it. In both those cases the circumstances are enumerated which will take cases out of the operation of the rule. They are so numerous as to well nigh abrogate the rule itself. In England the rule has been repudiated, and such actions are placed upon the same footing with other actions on contracts. Williams v. Burrell, 1 Man., G. & S. 402; Lock v. Furze, 19 C. B. (N. S.) 96. In this state the rule has not been adopted, and we are not disposed to adopt it. We think it better to discard the rule, so as to be in a position to determine all such cases upon the general principles applicable to other contracts. In that way we think we shall be the better prepared to do justice in each case as it arises.

We suppose the correct rule to be that the plaintiff is entitled to recover the rent paid, and the difference between the rent agreed to be paid and the value of the term, together with such special damages as the circumstances may show him to be entitled to. Trull v. Granger, 8 N. Y. 115. The theory upon which the court below assessed damages being inconsistent with these principles, the judgment must be reversed, and a new trial ordered. The other judges concurred.

KNOWLES v. STEELE.

(61 N. W. 557.)

Supreme Court of Minnesota. Dec. 21, 1894.

Appeal from district court, Hennepin county; Henry G. Hicks, Judge.

Action by Alfred H. Knowles against Franklin Steele, Jr., for damages for breach of contract. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

George R. Robinson, for appellant. Kitchel, Cohen & Shaw, for respondent.

MITCHELL, J. The following condensed statement of the facts will be sufficient for the purposes of this appeal: In 1881, the defendant, being the owner of the premises described in the complaint, executed a lease (in which his wife joined) to plaintiff for the term of 10 years at an agreed annual rent. This lease contained a covenant that if the lessee should desire to continue the lease for another 10 years he should have the privilege of doing so in the manner following. Not less than three months before the expiration of the original term the lessee should give to the lessors notice in writing of his election to continue the lease for an additional term, and in such notice name and appoint an appraiser on his part. Thereupon the lessors should appoint an appraiser on their part, and notify the lessee of such appointment. The two appraisers thus appointed were to appoint a third, and the three so chosen were to appraise the leased premises at their then fair market value, "and thereupon, without any further act, this lease shall thereupon be extended for the further term of ten years, upon the same terms and conditions as before, except that the annual rent for such second term shall be such sum as is equal to six per centum of such appraised valuation." In 1891 plaintiff seasonably gave defendant written notice of his election to continue to lease for a second term, and in such notice nominated an appraiser on his part to appraise the property for the purpose of fixing the amount of the rent for the additional term. On receipt of this notice defendant sent plaintiff a written communication, by which, in order to avoid the necessity of appointing appraisers, he proposed to fix the rent for the extended term at 6 per cent. on the then present assessed valuation of the property, $31,000. Immediately on receipt of this proposition the plaintiff wrote to defendant, notifying him of his acceptance of it. The fact was, although unknown to plaintiff, that soon after the execution of the lease in 1881 the defendant had conveyed the premises, through the medium of a third party, to his wife, from whom he had no authority to make or accept the proposition referred to, and shortly afterwards she wrote plaintiff, notifying him that she declined to be bound by the act of her husband, and suggesting that, if they could not agree on the amount of the rent, they should resort to an appraisal of the property in accordance with the terms of the lease. Plaintiff having refused to accede to the proposition, Mrs. Steele brought an action against him to recover possession of the property, in which the court decided that the notice served on her husband was sufficient to bind Mrs. Steele, but that she was not bound by the proposition made by him fixing the rent; and in accordance with the stipulation of the parties to the action the court gave Mrs. Steele further time in which to appoint an appraiser on her part, which she did. The two thus appointed by her and the present plaintiff, respectively, selected a third, and the three appraised the market value of the premises at $35,000, on which basis the rent for the second term was fixed at $2,100 per annum, at which rate the plaintiff has since paid, whereas the rent, according to the proposition of the defendant and accepted by plaintiff, would have been only $1,914 per annum. This action was brought to recover damages for defendant's breach of his contract fixing the rent on the basis of the assessed value of the property. No evidence was introduced as to the actual rental value of the premises, and, the ejectment suit between plaintiff and Mrs. Steele being res inter alios acta, nothing done or determined in that action is evidence against the defendant on that question.

The plaintiff contends that this is in the nature of an action for the breach of the covenant in the lease for the quiet enjoyment of the leased premises; that plaintiff had a right to purchase his right of possession from the true owner, and that his damages are what it cost him to secure this right, over and above the rent agreed on between him and defendant. The rule as to the measure of damages attempted to be invoked has no application to the case. Plaintiff's quiet enjoyment under the lease has not been disturbed. He has secured a second term on the exact terms upon which he was entitled to it under the terms of the lease. What he complains of is that, if defendant had been able to perform and had performed a certain other contract, he would have obtained the extension on better terms than he was entitled to under the original lease. He was not compelled to take a second term at all, still less to take it at a rent greater than the actual rental value of the premises. Therefore the measure of his damages, if he is entitled to any, is the loss of his bargain, viz. the difference between the rent agreed in the accepted proposition of the defendant and the actual market rental value of the premises at the time this agreement was made. Therefore, assuming that the proposition of the defendant and the acceptance of it by plaintiff constituted a binding contract, still the plaintiff was at most only entitled, under the evidence, to nominal damages; and a new trial will not be granted for a failure to assess nominal damages where no question of permanent right is involved. Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; Hill. New Trials, p. 572. This renders it unnecessary to consider any of the other questions discussed by counsel. Judgment affirmed.

GILFILLAN, C. J., absent, on account of sickness; took no part.

MYERS v. BURNS.

(35 N. Y. 269.)

Court of Appeals of New York. 1866.

John H. Reynolds, for appellant. James Emott, for respondent.

HUNT, J. This is an action for rent on a lease dated May 28, 1856, brought by the grantee of the reversion against the assignee of the term. The present defendant went into possession of the premises September 20, 1856.

The defense is a counter-claim, under a covenant of the landlord to keep the premises in repair. There is also connected with the covenant to repair, an agreement that if the premises were damaged by fire, so as to be unfit for a first-class hotel, the rent should abate. The counter-claim set up in the answer is, first, for $908, expended by the defendant in repairs, and second, for $700 damages occasioned by the loss of the use of four rooms, alleged to be untenantable for the want of repairs.

The rent due was $1,000, with interest from August 1, 1858.

The jury found specially $752.57, amount of repairs made by the defendant, and $300 damages for the loss of the use of the rooms. These amounts left a balance of $9.45 due to the defendant, for which he had a verdict.

The most important questions in the case were questions of fact, which were carefully and correctly submitted to the jury upon the trial, and in relation to which their decision is final.

A question arose upon the charge for painting, on which an exception was taken by the plaintiff. Certain portions of the woodwork of the hotel were repainted by the defendant with zinc paint, which was about fifteeen per cent. more expensive than common lead paint, which was the original style of painting, and was more durable and more ornamental. The court charged, that "the defendant was entitled to recover the full expense of the zinc paint, although it was more expensive than the description of paint originally employed, it appearing that it was more desirable and a better material than white lead." This charge was correct. The plaintiff had the option of making these repairs by his own mechanics, and with such suitable materials as he should select. His omission to do so gave the defendant the right to make them by his mechanics, and with such suitable materials as he should select. He was bound to be reasonable and judicious in his repairs; but he was not compelled to select precisely the same kind of paper or paint, or to be precise that the expense was not a farthing greater than had before been expended upon the same spot. He was at liberty to repair according to the modern style, and adopt modern improvements. The testimony showed that the repair for the purpose in question was a useful one, that it was necessary, and that it was not extravagant. The charge of the judge, and the finding of the jury under it, are unexceptionable.

The plaintiff also objects to the allowance of damages, and to the rule of damages adopted, on account of the loss of the use of certain rooms through a defect in the flues of the chimney. It appears that during some portion of the time, four rooms fronting on Hicks street were of no use to the defendant. When fires were kindled in them the flues would not draw, but the gas and smoke issued out into the rooms, rendering them uninhabitable. The court charged the jury "that the defendant was entitled to recover of the plaintiff as a counter-claim, the damages which he, the defendant, had sustained by reason of the loss of the use of the rooms, so far as caused by a defect in the flues of the chimney, without reference to the cause of the defect, and that the fair value of the use of such rooms, for the time they were unoccupied by reason of such defect, was the amount to which the defendant was entitled." This charge involved two propositions: First, that the plaintiff was responsible, although the defect in the flue was in its original construction, and had not occurred through dilapidation or decay; and secondly, that the loss of the use of the rooms afforded the rule of compensation, instead of the expense of actual repair by the defendant. The exception was to the entire charge as stated. If either of the propositions was correct, the exception was too general, and is unavailing. I think the charge however was correct in both aspects.

On the first point. The plaintiff's grantor leased the premises in question as a "first class hotel," and he covenanted "to keep the said hotel and premises in good necessary repair during the term, at his own proper charge and expense." Are the rooms of a hotel in good repair for such a purpose, when they are so smoky that they cannot be occupied; or when the more offensive coal gas issues at all times from the lighted grate and fills the room with its noxious substance? No tenant or occupant can inhabit such rooms when a fire is needed, and fires are needed in the city of Brooklyn during three-fourths of the year. A house or a room that cannot be comfortably and safely inhabited is not in good repair. A room in a first-class hotel, where women and children usually form portions of the family, cannot be tenantable or in good repair unless a fire can be had when desired. Nor is it important, either to the tenant or landlord, whether such defects in the flues are caused by dilapidation or arise from original misconstruction. The rooms are equally untenantable and uninhabitable; they are equally out of repair, from which cause soever the difficulty may have arisen. The grates are in their places, and the flues are in the walls. No new structures of an original character are required. It is only required that those in the building should be made to perform their proper duty. The party agrees to "keep" in repair, and if, to keep in repair, it is necessary that the rooooms should first be put in repair, the lessor is bound to perform that duty. Mayne, Dam. 133, 92 Law Lib.; Payne v. Haine, 16 Mees. & W. 541. There is no covenant that the rooms be kept in their then condition of repair, and no exception of natural wear and natural decay; but good repair and good condition at all times is the fair intent of the agreement. The requirements of a first-class hotel in Brooklyn demand all the comforts and conveniences, and many of the luxuries of civilized life. Different standards of comfort and civilization prevail in different parts of the world. The location in question was that of the second city of the state, immediately adjoining the city of New York, and the general standard of that latitude must be assumed. A hotel of the first class in such a location without the means of heating its rooms would not be tolerated. It would not indeed be a hotel of that character. If the rooms had been rendered untenantable, by water from the roof, would it have been an answer to the request to repair, that the leak existed when the lease was entered into? If the ceilings had fallen, or the rooms were filthy from dirt and want of paint, it certainly would have been no answer, that they were in that condition when the lease was made. The condition of the covenant, to keep in repair, as already stated, can only be performed by first putting in repair, when that is necessary. Beach v. Crain, 2 N. Y. 86, and cases supra.

The second proposition involved the extent of the damages; the plaintiff claiming that the defendant was entitled to no larger sum than it would have cost if the defendant had himself repaired the defect, and the defendant claiming that he was entitled to recover as damages the loss that he actually sustained, from being deprived of the use of the rooms.

The defendant had two different remedies, of either of which he could have availed himself, in the event of the plaintiff's failure to repair, after due notice. He could have made the repair himself, and have called upon the plaintiff to refund the expense, as he actually did, in the case of the painting; or he could have called upon the plaintiff to take the ordinary responsibility of a party failing to perform his contract, to wit, to pay the damages caused by such failure, as he did in regard to the item in question. In the first case, the rule confines the damages to the actual expense, if no special damage is shown; but in the other, the cost of the repair is not an element in the case. It is as if there was no such right to repair on the part of the lessee, but the claim rested solely in damages. In Griffin v. Colver, 16 N. Y. 489, it was held that in the case of a failure to deliver a steam engine at the time contracted, the party injured could recover all his damages, including gains prevented as well as losses sustained, provided they were certain, and such as might naturally be expected to follow the breach. According to the reasoning of the learned judge in that case, the damages for the loss of the use of the rooms as here claimed, are both certain and proximate. See, also, Freeman v. Clute, 3 Barb. 424, as explained by Judge Selden; and Trull v. Granger, 8 N. Y. 115; and Doe v. Rowlands, 9 Car. & P. 734, 38 E. C. L. 425.

The judgment should be affirmed. All concur, except DAVIES, C. J., and MORGAN, J., dissenting.

NOTE. In Cook v. Soule, 56 N. Y. 420, the court, referring to the rule laid down in Myers v. Burns, supra, said, per Grover, J.: "There may be exceptions to this rule. In cases where the requisite repairs are trifling, and the damages by not making them are large, I think it is the duty of the tenant to make them, and charge the landlord with the cost. Miller v. Mariner's Church, 7 Greenl. 51; Loker v. Damon, 17 Pick. 284. The tenant, after giving reasonable notice and opportunity to the landlord to make the repairs, if he neglects, may himself make them, and charge the landlord with the expense."

FISHER v. GOEBEL.

(40 Mo. 475.)

Supreme Court of Missouri. March Term, 1867.

Error to St. Louis court of common pleas.

Glover & Shepley, for plaintiff in error. Krum, Decker & Krum, for defendant in error.

HOLMES, J. The plaintiff had leased from the defendant the premises called the "Flora Garden," situated on the corner of Seventh street and Geyer avenue, in 1855. There was a cut some 15 or 20 feet deep on Geyer avenue, and the lessor covenanted in the lease that he would build at his own expense a rock wall and fence on that side: and the lessee covenanted to keep the leased property in a state of repair. Some two years after this wall was erected, it fell down by parts by the action of the elements. The defendant was called upon to rebuild it, but before this was done the plaintiff abandoned the premises and surrendered his lease.

The plaintiff proceeds on the assumption that the covenant of the lessor had been broken by the falling down of this wall, and that it belonged to the lessor and not to himself to rebuild it. The case appears to have been tried on this theory, and the principal matters submitted for decision concern the instructions of the court on the measure of damages.

The jury were instructed for the plaintiff upon the basis that the proper measure of damages was the difference between the rent and value of the leasehold premises with a good and permanent wall standing, and their value in the condition in which they were left without such wall.

The defendant's instructions were predicated upon the rule that only the actual damages resulting directly from the defendant's default in relation to the stone wall, to be measured by what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant, could be recovered.

The jury found a verdict for the plaintiff for $4,750 damages, and upon a remittitur of $2,375 the defendant's motion for a new trial was overruled, and judgment rendered for the balance.

Under these covenants, it might admit of serious question whether the plaintiff, after he had accepted the wall without remonstrance, and safely occupied the premises for two years, was not bound under the covenant for repairs to rebuild the wall himself, or at least to put and keep it in a state of repair, charging the defendant with damages only for the original deficiency of structure. But it appears to have been left to the jury under the instructions to say whether the covenant for the building of a wall had been complied with, and whether the plaintiff had sustained damage in consequence of a breach thereof; and the case will be considered here only on the matter of the damages.

Upon the facts of the case, we think the instruction given for the plaintiff allowed a larger latitude and measure of damages than the justice or the law of the case will warrant, and that the rule given in the defendant's instructions should have been adopted.

In Vivian v. Champion, 2 Ld. Raym. 1125, it was said that the proper measure of damages in a breach of such covenants was what it would cost to put the premises in repair. This rule appears to have been slightly modified in some modern cases on covenants by tenants for repairs, but, as we conceive, not to the extent implied in this instruction for the plaintiff. Smith v. Peat, 9 Exch. 165; Penley v. Watts, 7 Mees. & W. 601; City of Worcester v. Rowlands, 9 Car. & P. 739; Walker v. Swayzee, 3 Abb. Prac. 136. It has been said to cover such damages as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by the other party. Loker v. Damon, 17 Pick. 288. It has been allowed to include such losses in addition to the actual cost of repair as were necessarily sustained during the periods required for making repairs, and some compensation for any loss of the use of the premises whilst they were undergoing repairs. Middlekauff v. Smith, 1 Md. 327. But we find no satisfactory authority for the position that the tenant in such case may wholly neglect to make the necessary repairs himself, allow his leasehold to depreciate in value, or his business to be broken up and abandon his lease, and then claim for his damages the whole loss so incurred. The greater part of such damages as these might have been avoided, and are to be attributed to his own fault; and for that he must be content to bear the loss himself. Thompson v. Shattuck, 2 Metc. (Mass.) 615. As a general rule, we think it may be said that the recovery must be confined to the actual damages, which are the direct, immediate, or proximate, and unavoidable consequence of the breach of the covenant. Sedg. Meas. Dam. 195–199.

The evidence shows that this wall might have been rebuilt at a cost of some six or eight hundred dollars, and we are inclined to think that the plaintiff has recovered a larger amount than he was justly entitled to claim, notwithstanding the remittitur.

For these reasons the judgment will be reversed and the cause remanded. The other judges concur.

WATRISS v. FIRST NAT. BANK OF CAMBRIDGE.

(130 Mass. 343.)

Supreme Judicial Court of Massachusetts. Middlesex. Feb. 21, 1881.

Action by Sarah W. Watriss against the First National Bank of Cambridge. Defendant was plaintiff's tenant, and, at the termination of its lease, removed fixtures from the leased premises. This action is for breach of the covenant to surrender the premises in good condition. Judgment for plaintiff.

S. H. Dudley, for plaintiff. J. W. Hammond, for defendant.

GRAY, C. J. As a general rule, the measure of damages for the breach of a lessee's covenant to keep in repair, and to surrender the demised premises at the end of the term in as good order and condition as they are in at the beginning of it, is the sum it would cost to repair the premises and put them in the condition they ought to be in. In the time of Lord Holt, this was the rule even in an action brought before the expiration of the lease. Shortridge v. Lamplugh, 2 Ld. Raym. 798, 803, 7 Mod. 71, 77; Vivian v. Champion, 2 Ld. Raym. 1125, 1 Salk. 141. In Vivian v. Champion, that great judge said: "In these actions there ought to be very good damages; and it has always been practised so before me, and everybody else that I ever knew. We always inquire, in these cases, what it will cost to put the premises in repair, and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises."

According to later cases, when the lessor sues on the covenant to repair, pending the lease, and so before he is entitled to possession of the premises, the damages may perhaps be limited to the diminution in the market value of his estate. See Nixon v. Denham, 1 Ir. Law R. 100, 1 Jebb & S. 416; Smith v. Peat, 9 Exch. 161; Macnamara v. Vincent, 2 Ir. Ch. 481; Davies v. Underwood, 2 Hurl. & N. 570; Bell v. Hayden, 9 Ir. C. L. 301; Mills v. Guardians of Poor, L. R. 8 C. P. 79; Mayne, Dam. (3d Ed.) 229. But when the action is brought after the end of the term, the measure of damages is still held to be such a sum as will put the premises in the condition in which the tenant is bound to leave them. Elliott v. Watkins, 1 Jones, Exch. 308; Burdett v. Withers, 7 Adol. & E. 136, 2 Nev. & P. 122; Penley v. Watts, 7 Mees. & W. 601, 610, 611; Payne v. Haine, 16 Mees. & W. 541; Yates v. Dunster, 11 Exch. 15; Rawlings v. Morgan, 18 C. B. (N. S.) 776; Mayne, Dam. 232, 233. In Yates v. Dunster, Baron Parke quoted the statement of Lord Holt, above cited, and referred to Newcastle v. Broxtowe, 4 Barn. & Adol. 273, 1 Nev. & Man. 598, in which, in an action against the hundred for the demolition of a house by rioters, it was held that the owner of the house was entitled to recover that sum of money which would replace the house, as nearly as practicable, in the situation and state it was at the time of the outrage committed, although the injury to its rental value was only one fourth as much.

Without undertaking to lay down an inflexible rule, applicable to all cases, we are of opinion that in the present case the defendant is not aggrieved by the ruling at the trial. The action is brought after the termination of the lease, and the surrender of the premises by the defendant to the plaintiff. The wrong complained of is not mere dilapidation or suffering to go to decay; but it is the voluntary removal of fixtures that had been annexed to the freehold, and were part of the plaintiff's real estate, at the beginning of the lease sued on. Watriss v. Bank, 124 Mass. 571. In such a case, the measure of damages must be the sum which will put the premises in the condition in which the defendant was bound to leave them, allowing for reasonable use and wear. When that sum is less than the diminution in the market value of the premises by the removal of the structures, neither party suffers by this rule; because the plaintiff, by applying that sum to the restoration of the premises, obtains a full indemnity. When, as in this case, that sum exceeds the amount of the injury to the market value of the premises, the plaintiff is entitled to it; otherwise, a tenant who, without the consent of his landlord, had altered the nature or the arrangement of the buildings demised, might escape all liability for more than nominal damages for the breach of his covenant, by proving that his alterations had increased the market value of the estate. Elliott v. Watkins, above cited. Maddock v. Mallet, 12 Ir. C. L. 173.

This case is not distinguishable in principle from Lawton v. Railroad Co., 8 Cush. 230, which was an action for breach of an agreement to build fences between the lands of the plaintiff and of the defendant; the defendant contended that the plaintiff could only recover damages for the injury to his land by its being unfenced; but it was held that he was entitled to the sum which it would fairly cost to put up the fences according to the agreement.

Whether the defendant is legally entitled to an allowance for the increase of value by substituting new material for old need not be considered, because in this case such an allowance has been made with the plaintiff's assent.

Judgment for the plaintiff for the larger sum.

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SUTHERLAND v. WYER et al.

(67 Me. 64.)

Supreme Judicial Court of Maine. April 9, 1877.

Exceptions from superior court, Cumberland county.

Assumpsit by John Sutherland against I. T. Wyer and others to recover for breach of contract. On December 27th following, the company of which the plaintiff was one were addressed by one of the defendants as follows: "Ladies and gentlemen, I find it necessary to reduce your salaries one-third; any one not willing to accept these terms will get their full salary this week and be discharged."

The following correspondence was also introduced:

"Portland, December 29, 1875. Mr. J. Sutherland: Your salary, from this date, will be twenty-four dollars per week. Per order, I. T. Wyer, Wm. Weeks, Treasurer."

"Portland, December 31, 1875. I. T. Wyer, Esq. Dear Sir: Your note intimating your determination to reduce my salary from the 27th instant, duly received. I most respectfully refuse to assent to any such proposition, and will expect my full salary every week, in fulfillment of the terms of our contract. Respectfully yours, J. Sutherland."

"Portland, January 3, 1876. Mr. Sutherland: Your services will not be required at the Portland Museum after January 8, 1876. I. T. Wyer."

The jury were instructed as follows:

"If, on the other hand, you find for the plaintiff upon both branches of the case, you will come to the question of damages, which in this case assumes a somewhat peculiar phase. The writ is dated January 11th. When the writ was brought, according to the contract nothing whatever was due to the plaintiff. The plaintiff had been paid in full up to January 8th. And this writ was brought on Tuesday, the 11th, before another week had elapsed. So, according to the terms of the contract, when this action was brought nothing whatever was due to the plaintiff.

"The general rule is—and it is almost an invariable rule, with the exception of some classes where prospective damages are allowed resulting from injury—that the damage to be allowed is the damage that had accrued when the writ was brought. The ordinary rule is that a man can only recover what was due him at the time when he sued. But I apprehend there is a rule which will guide as correctly in determining the damages here. The damage to be allowed is what had been sustained by the plaintiff at the time this writ was brought. Now what is that damage he had sustained then? It is conceded that he had been discharged. He had lost then the prospect of earning his wages in accordance with the terms of the contract; that is to say, when he brought this writ he had been discharged, and of course if you come to this question of damages, the defendant had broken his contract.

"With the contract in full force the plaintiff had a certainty of $35 a week during the theatrical season. As we are discussing the question of damages we will assume the defendant had broken the contract. By breaking the contract the defendant had deprived the plaintiff of the right to earn by his services $35 per week according to the terms of the contract during the theatrical season. So that the certainty of earning the money, in accordance with the terms of the contract, is one thing the plaintiff had lost; but it does not follow that he is entitled to recover that full sum during the theatrical season. A man has not the right to remain idle if other work offers and charge the whole amount to his employer. Notwithstanding the damage in such case done to the plaintiff, the law would still require him to exercise his best diligence to obtain new employment and so diminish the damage. So that the rule of damage in this case, as I understand it and as I give it to you for the purpose of this case, would be the amount accruing subsequently to the discharge in accordance with the terms of the contract itself, less whatever you are satisfied from the evidence in the case the plaintiff might earn by the exercise of reasonable and proper diligence on his part. The jury must take the whole testimony together, and from their best judgment of what the plaintiff might earn by the exercise of reasonable diligence on his part, and that, if you come to the question of damages, you must deduct from the amount due according to the contract."

Verdict for plaintiff. Defendants moved to set the verdict aside, and excepted. Judgment for plaintiff on conditions.

C. Hale, for plaintiff. J. Howard, N. Cleaves, and H. B. Cleaves, for defendants.

VIRGIN, J. The plaintiff contracted with the defendants to "play first old man and character business, at the Portland museum, and to do all things requisite and necessary to any and all performances which" the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein, and continued to perform the theatrical characterizations assigned to him, without any suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week: when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it; and the action was not brought until after the discharge and consequent breach. Howard v. Daly, 61 N. Y. 362, and cases; Dugan v. Anderson, 36 Md. 567, and cases. The doctrine of Daniels v. Newton, 114 Mass. 530, is not opposed to this. Neither do the defendants insist that the action was prematurely commenced; but they contend that the verdict should be set aside as being against the weight of evidence.

The verdict was for the plaintiff. The jury must therefore have found the real cause of his discharge to be his refusal to consent to the proposed reduction of his salary. The evidence upon this point was quite conflicting. Considering that all the company were notified, at the same time, that their respective salaries would be reduced one-third, without assigning any such cause as incompetency; that no suggestion of the plaintiff's incompetency was ever made to him, prior to his discharge; and that his written discharge was equally silent upon that subject, —we fail to find sufficient reason for disturbing the verdict upon this ground of the motion, especially since the jury might well find as they did on this branch of the case, provided they believed the testimony in behalf of the plaintiff.

There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule, are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. Remelee v. Hall, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. Sibley v. Rider, 54 Me. 463; Philbrook v. Burgess, 52 Me. 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. Prima facie, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. Miller v. Mariners' Church, 7 Me. 51, 56; Jones v. Jones, 2 Swan, 609; 2 Greenl. Ev. § 261, and notes; Chamberlin v. Morgan, 68 Pa. St. 168; Sedg. Meas. Dam. (6th Ed.) 416, 417, cases supra. The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance with interest thereon should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60, from all sources after his discharge,—$25 in February, and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10th, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6th, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and a new trial granted.

APPLETON, C. J., and DICKERSON, BARROWS, DANFORTH, and LIBBEY, JJ., concurred.

LIDDELL v. CHIDESTER.

(4 South. 426, 84 Ala. 508.)

Supreme Court of Alabama. June 14, 1888.

Appeal from circuit court, Montgomery county; John P. Hubbard, Judge.

This was an action brought by the appellee, Thomas H. Chidester, against the appellant, Forbes Liddell, for the recovery of a balance alleged to be due the plaintiff from the defendant for services rendered, and by contract entered into by plaintiff and defendant. The defendant pleaded the general issue, payment, and res adjudicata. The plaintiff demurred to the defendant's plea of res adjudicata. The court overruled the demurrer. There was then a replication, and the pleadings were very full. The court charged the jury, at the written request of the plaintiff, as follows: (1) "If the jury believe all the evidence, they must find a verdict for the plaintiff." (2) "If the jury believe the evidence, the plaintiff would be entitled to recover the balance due under said contract for each month, or part of a month thereof, from the 1st day of August, 1885, at the contract price, until the end of the contract year, which was February 26, 1886, with interest thereon from this last date." The defendant objected to the giving of each of these charges by the court, and duly excepted to the court's overruling his objection. The rulings of the court on the demurrer, and the giving of the first and second charges requested by the plaintiff, were here assigned as error.

Arrington & Graham, for appellant. Troy, Tompkins & London, for appellee.

STONE, C. J. The most important inquiry in this case, alike of law and of fact, was whether Chidester was employed by Liddell to perform a year's service for $1,000, to be paid in gross, or to be paid in monthly installments. If the former, then the recovery and enforcement of the judgment for a part of the demand in June, 1886, is a complete defense and bar to this action, and nothing should be recovered. This, under the well-known principle that a plaintiff cannot split up a single cause of action into two or more suits; and if he does so, and recovers a part of his demand, this is a waiver of and a bar to the residue of his claim, be it much or little. Oliver v. Holt, 11 Ala. 574; O'Neal v. Brown, 21 Ala. 482; Railroad Co. v. Henlein, 56 Ala. 368; Wharton v. King, 69 Ala. 365. If, on the other hand, the wages were due and demandable at the end of each month, then the recovery of one installment, unreversed, is a complete answer to and preclusion of all defenses to the merits which were or could be pleaded to such second suit. Rake v. Pope, 7 Ala. 161; 3 Brick. Ala. Dig. p. 580, § 75 et seq.; 1 Whart. Ev. § 758; Gardner v. Buckler, 3 Cow. 120. The contract in this case was by telegraphic correspondence. Liddell's offer was: "If one thousand dollars a year is an inducement, come immediately. Answer." Chidester's acceptance was: "Will accept one thousand dollars a year." These communications, unexplained, show a single contract for a year; the wages to be $1,000 in gross. There was testimony that, up to the time of Chidester's discharge, his wages were paid to him monthly; but the testimony on this subject was somewhat in conflict. Partridge v. Forsyth, 29 Ala. 200; Commercial Fire Ins. Co. v. Capital City Ins. Co., 81 Ala. 320, 8 South. 222. It is contended for the appellee that the verdict and judgment in the former suit—that which was tried in 1886—are conclusive that Chidester's wages were due and payable in monthly installments, and that without such finding the jury could not have rendered a verdict in his favor. The elements necessary to constitute a judgment in one suit a bar to a second suit are "(1) that the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein; (2) that the former judgment was upon the merits." Freem. Judgm. § 256. "It is only of those matters which, as promises, enter into and uphold the judgment, (the judgment being the conclusion of the syllogism,) and connected, qualifying matters, which, if produced, would change or impair the legal force and effect of the cause of action itself on which the judgment was rendered, that the judgment pronounced becomes conclusive." Haas v. Taylor, 80 Ala. 459, 2 South. 633. To be a bar it must appear that the fact claimed to have been established "was essential to the finding of the former verdict." 1 Greenl. Ev. § 534; Chamberlain v. Gaillard, 26 Ala. 504; Gilbreath v. Jones, 66 Ala. 129; McCall v. Jones, 72 Ala. 368; Hanchey v. Coskrey, 81 Ala. 149, 1 South. 259. In the first suit, instituted before a justice of the peace, the cause of action was described as follows: "The plaintiff claims of defendant $41.50, due by on 26th July, 1885, for salary due and for services rendered by plff. to the deft." When the case reached the circuit court by appeal, a new complaint was filed with three counts, two common and one special. The first count was "for work and labor done by the plaintiff for the defendant, and at his request, during the month of July, 1885." The second count was for the "sum of fifty dollars due by account stated between the plaintiff and the defendant on, to-wit, the 1st day of August, 1885." The third count was a special count. It averred that there was a contract for a year, the wages to be paid in monthly installments of $83.33; that plaintiff, Chidester, was serving, and ready to serve, when on July 15, 1885, without fault on his part, Liddell discharged him, paying him on that month's wages $30, leaving the balance, $41.50, unpaid. For that balance, with interest, this count claimed judgment. The recovery was for that sum, with interest, which was acquiesced in and paid. It is settled in this state, by many decisions, that, when Chidester was discharged, he had the option of one of three remedies if the discharge was wrongful: (1) He could have elected to treat the contract as rescinded, and sue on a quantum meruit for any labor he may have performed; (2) he could have sued at once for an entire breach of the contract by the defendant, in which event he would have been entitled to recover all damages he suffered up to the trial, not exceeding the entire wages he could have earned under the contract; or (3) he could have waited until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. Each of these alternate rights, as we have seen, was dependent on his fixing on Liddell the fault of his discharge. Strauss v. Meertief, 64 Ala. 299; Davis v. Ayres, 9 Ala. 292; Ramey v. Holcombe, 21 Ala. 567; Fowler v. Armour, 24 Ala. 194; Holloway v. Talbot, 70 Ala. 389; Wilkinson v. Black, 80 Ala. 329; 3 Wait, Act. & Def. 606. And, when wages are payable in installments, suits may be brought on the several installments as they mature. Davis v. Preston, 6 Ala. 83. It is manifest that the former suit was not brought on the first of the alternate grounds stated above. There is nothing to show that it relied on the rescission or abandonment of the contract; and, if it had, there were no past services actually rendered, and unpaid for, on which to found a recovery. The suit was for that part of the salary for July which had not been paid. Nor was the suit brought on the second of the grounds,—an entire breach of the contract. On the contrary, it treated the contract as continuing through the month of July, and sued for the wages alleged to have been constructively earned in July, after the discharge. The former suit was, then, brought on the third of the grounds, treating the contract as still binding on Liddell, and claiming wages according to its terms. It was brought July 27, 1885, the first day after the completion of one of the months of the wage year. If the contract was for the payment of $1,000 in gross at the end of the year, February 26, 1886, that suit was prematurely brought, and there could have been no recovery. It was indispensable to plaintiff's right of recovery to show that, by the terms of the contract, his wages were due in monthly installments, one installment of which had matured. This was "essential to the finding of the former verdict." The foregoing facts are placed beyond dispute in the record before us. They estop Liddell from denying that, by the terms of his contract with Chidester, he was to pay him wages in monthly installments, and that he discharged plaintiff without cause; and the same inevitable result would follow, no matter what proof he might offer that the contract was for the payment of Chidester's salary in gross, and that he had good grounds for discharging him. We have not deemed it necessary to consider the rulings on demurrer. Whether right or wrong, they could not have affected the defendant injuriously. There was no error in the charges of the court. Affirmed.

McMULLEN v. DICKINSON CO.

(62 N. W. 120, 60 Minn. 156.)

Supreme Court of Minnesota. Jan. 30, 1895.

Appeal from district court, Hennepin county; Seagrave Smith, Judge.

Action by William McMullen against the Dickinson Company. From an order sustaining a demurrer to the answer, defendant appeals. Affirmed.

Penney, Welch & Hayne and H. J. Horn, for appellant. W. H. Donahue, for respondent.

CANTY, J. On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of $1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of $125 for each of the months of March and April, 1894, and prays judgment for the sum of $250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of $512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in Gandell v. Pontigny, 4 Camp. 375, and this case was followed in England and this country for a long time (Wood, Mast. & Serv. 254), and is still upheld by several courts (Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Strauss v. Meertief, 64 Ala. 299). It has been repudiated by the courts of England (Goodman v. Pocock, 15 Adol. & E. [N. S.] 574; Wood, Mast. & Serv. 254), and by many of the courts in this country (Id.; and notes to Decamp v. Hewitt, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246; Moody v. Leverich, 4 Daly, 401; Colburn v. Woodworth, 31 Barb. 381; Booge v. Railroad Co., 33 Mo. 212. No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Suth. Dam. 471; Gordon v. Brewster, 7 Wis. 355; Fowler & Proutt v.

Armour, 24 Ala. 194; Wright v. Falkner, 37 Ala. 274; Colburn v. Woodworth, 31 Barb. 385. Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a 30 year contract is no greater than for the breach of a 6 or 7 year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Suth. Dam. (1st Ed.) 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. Fowler & Proutt v. Armour, 24 Ala. 194; Strauss v. Meertief, 64 Ala. 299. But the wrongdoer can have no such election. He should not be allowed to take advantage of his own wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total. The order appealed from should be affirmed. So ordered.

OLMSTEAD v. BACH et al.

(27 Atl. 501, 78 Md. 132.)

Court of Appeals of Maryland. Oct. 5, 1893.

Appeal from Baltimore city court.

Action by Charles B. Olmstead against Henry Bach, Jr., and others, for breach of contract of employment. A demurrer to the replication was sustained, and plaintiff appeals. Affirmed.

Argued before ALVEY, C. J., and ROBINSON, BRYAN, IRVING, McSHERRY, FOWLER, PAGE, and ROBERTS, JJ.

Charles Marshall and Wm. L. Hodge, for appellant. Thos. M. Lanahan and Frank Gosnell, for appellees.

McSHERRY, J. The declaration in this case alleges that the plaintiff and defendants entered into a written contract under seal, whereby the latter agreed to pay to the former a salary of $50 per week, payable weekly, as compensation for the services of the plaintiff as cutter in the business of the defendants, and that the plaintiff agreed, in consideration of said salary, to devote his time and attention to the business of the defendants, as is usual in conducting a merchant tailoring business. The agreement further provided that the contract should continue in full force for one year from February 1, 1892, to February 1, 1893. The declaration also avers that the plaintiff entered into the service of the defendants under the above contract, and performed his duty thereunder until April 5, 1892, when the defendants refused to permit him to perform his part of said contract, or to pay him the salary to which he was entitled thereunder, after April 9, 1892. It further alleges that the plaintiff has always been ready and willing to perform his part of the contract, and to render the services which he agreed thereby to perform, and has always held himself in readiness and offered to perform said services according to said contract, but that the defendants have refused to permit him to perform the contract on his part, and have refused, and still do refuse, to pay him the salary of $50 a week, as therein provided, since April 9, 1892. It concludes with a claim by the plaintiff "that there is due and unpaid to him of the amount payable to him under said contract the sum of two hundred and fifty dollars, being the amount of said weekly salary stipulated to be paid by said contract to the 25th of May, 1892."

Among the defenses relied on the defendants pleaded that on April 5, 1892, they dismissed the plaintiff from their service, and at the same time paid him all wages or salary due to him under the contract down to April 9th, the end of the week terminating four days after his dismissal; that nine days after said dismissal the plaintiff brought suit against the defendants before a justice of the peace upon the identical contract and cause of action sued on in the case at bar, and that thereafter the plaintiff recovered judgment in that suit for the sum of $50 and costs, which judgment was fully paid and satisfied by the defendants before the pending action was brought. To this plea the plaintiff replied that after the pretended dismissal of him by the defendants he, notwithstanding the dismissal, presented and offered himself to the defendants as ready and willing to perform his part of the contract set forth in the declaration, and did in fact continuously so offer to perform the same, and that the suit mentioned in said plea was a suit for his salary for one week under said contract. This replication was demurred to. The Baltimore city court sustained the demurrer, and entered judgment thereon for the defendants. The plaintiff thereupon took this appeal from that judgment.

It is apparent from this outline of the pleadings that the wages or salary now sought to be recovered, as well as those sued for before the magistrate, were not wages or salary which had been actually earned, but were wages or salary for work and labor that the plaintiff was ready and willing, but had not been allowed, to perform. That the contract declared on was broken by the defendants when they dismissed the plaintiff is conceded, or, at least, is not denied, by the pleadings. For that breach the plaintiff was clearly entitled to recover. But to what extent, and how often? The answer to these inquiries involves at the very outset an examination of the scope of the agreement set forth in the declaration, as to whether it is an entire or divisible one; because, if it be entire and indivisible, and there has been but a single breach, but one action can be brought therefor. The contract is one of hiring. Under it the plaintiff was employed as a cutter at $50 per week, payable weekly, and it was expressly provided that this employment and this weekly payment of wages should continue for one year. The duration of the employment was as much an integral part of the agreement as the stipulation relating to the amount of the compensation and the stated periods for its payment. It was not a hiring by the week, payable weekly, because it was explicitly declared that it should continue for a year. It was not 52 separate, independent contracts, but one indivisible agreement, covering the period of a year, and making provision for the weekly payment of wages. The consideration for the plaintiff's undertaking was the defendants' agreement to pay him $50 a week and to employ him as a cutter for one year. The latter was as much a part of the consideration promised him for entering the service of the defendants as the former, for it would be wholly unreasonable to assume, as any other construction must, that it was the intention of the parties that the hiring should be for a week, determinable by notice, or else merely a hiring at will, as it undoubtedly would have been had there been no stipulation as to its duration. Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. Rep. 176. The good sense and reasonableness of the particular case must always guide and govern courts in determining whether a contract is divisible or entire. Dugan v. Anderson, 36 Md. 585; Jones v. Dunn, 3 Watts & S. 109; Robinson v. Green, 3 Metc. (Mass.) 159. Whether a contract must be sued on as an entirety or is divisible and can become the foundation of separate suits for the infraction of independent stipulations depends on its terms; and, in order to arrive at a correct construction, due regard must be had to the intention of the contracting parties as revealed by the language which they have employed, and the subject-matter to which it has reference. Broumel v. Rayner, 68 Md. 47, 11 Atl. Rep. 833; Brewster v. Frazier, 32 Md. 308; Brantly, Cont. 216. Obviously the appellant expected and contracted for continuous employment for a year, and not for a weekly or still more precarious hiring at will, and the appellees contemplated securing a permanent cutter in their tailoring business. Certainty in the duration of the employment, as well as exemption from the annoyance incident to frequent changes in such an employ, were manifestly within the contemplation of both of the parties to the contract when it was entered into, and with these considerations before them it seems to us clear that the appellant never supposed himself only hired by the week or at will, and equally clear that the appellees never understood that their employe was at liberty to terminate the engagement upon a week's notice. The hiring was for a year and the wages were payable in weekly installments of $50 each. The subsidiary provision as to the payment of the wages each week does not split up the contract into as many agreements as there were payments or periods named for payments to be made, (Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. Rep. 12;) nor is it inconsistent with a yearly hiring, (Norton v. Cowell, 65 Md. 362, 4 Atl. Rep. 408; Fawcett v. Cash, 5 Barn. & Adol. 908;) for, as said by Lord Kenyon in King v. Birdbrooke, 4 Term R. 245: "Whether the wages be to be paid by the week or the year can make no alteration in the duration of the service if the contract were for a year." The contract is, then, an entire, and not a divisible, one. It does not consist of distinct and independent subjects which admit of being separately executed and closed. A dismissal during the year was consequently a breach of the contract as an entirety, and furnished the party not in default with a good cause of action. The contract being entire, and having created the relation of master and servant, and the latter having been, as averred in the pleadings, dismissed before the expiration of the term for which he had been engaged, what redress was open to him? Obviously but one remedy for the recovery of the whole damage sustained by him. In Keedy v. Long, 71 Md. 389, 18 Atl. Rep. 704, this court said: "A servant wrongfully discharged has only two remedies open to him at law, either of which he may pursue immediately on his discharge. First, he may treat the contract as continuing, and bring a special action against the master for breaking it by discharging him, and this remedy he may pursue whether his wages are paid up to the time of his discharge or not; or, secondly, if his wages are not paid up to the time of his discharge, he may treat the contract of hiring as rescinded, and sue his master on a quantum meruit for the services he has actually rendered. These two alternative remedies are the only ones open to him. Mayne, Dam. 159. Upon a quantum meruit he can only recover for the services actually rendered. Archard v. Hornor, 3 Car. & P. 349; Smith v. Hayward, 7 Adol. & E. 544. In an action for damages for a breach of the contract he will be entitled to recover the actual damages he has sustained, in addition to the wages earned; and in case he has by diligence been unable to secure other employment during the entire term, he can recover the entire wages, less the amount he has actually earned during the interim, or the amount he might have earned by the exercise of proper diligence in seeking for employment in the same or similar business. Wood, Mast. & S. 249; Mayne, Dam. 158; Elderton v. Emmens, 6 C. B. 160; Goodman v. Pocock, 15 Q. B. 576." Jaffray v. King, 34 Md. 217. In the case at bar the pleadings show that all wages earned by the appellant had been paid to him in full up to the end of the week during which he was dismissed. When he brought suit before the justice of the peace he had earned no wages which had not been paid him, for he had rendered no services after his dismissal. He was, therefore, at that time in no position to sue upon a quantum meruit for the value of services actually performed, and he could only recover in that suit damages for a breach of the entire contract, unless the contract was divisible into 52 independent agreements, each capable of being separately executed and closed. His wages having been paid in full up to the time of his dismissal, he had no option as to the remedies which he might pursue. He was confined to an action for the recovery of damages which he had sustained by a breach of the contract, because successive actions, instituted for the recovery of fractions of the same aggregate damages, cannot be supported. His suit before the magistrate was, whatever it purported to be, a suit for the breach of the contract of hiring. It could have been for nothing else, except for services never rendered, the value of which was measured by the price agreed to be paid for them when actually performed. There was but one dismissal and but one breach, and the plaintiff could not split up his cause of action, recovering a part of his damages in one suit and the remainder afterwards in other suits for that single breach. It is an ancient and familiar rule of law that only one action can be maintained for the breach of an entire contract, and the judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding. Sedg. Dam. 224; Dugan v. Anderson, 36 Md. 584. It was the appellant's plain duty to include all that belonged to that cause of action—that one breach—in the first suit, so that one proceeding and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in the first suit. Or, as expressed by Lord Campbell in Clossman v. Lacoste, 28 Eng. Law & Eq. 140, "if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract, and that he may recover therein all the damages that may ensue to him in consequence." Again, as clearly put by the supreme court of Ohio in James v. Allen Co., 44 Ohio St. 226, 6 N. E. Rep. 246: "As a result of the authorities, as well as upon principle, we are satisfied that in such a contract as the one in the case at bar, where the employe is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employe has, whether he brings it at once or waits until the entire period of time has expired, is an action for damages for the breach of contract; and the measure of damages will be the loss or injury occasioned by that breach, and one recovery upon such claim, whether the damages be denominated 'loss of wages' or 'damages for breach,' is a bar to a future recovery." Wood, Mast. & S. 246.

It is to be observed that the case at bar is distinguishable from a class of cases alluded to in Clossman v. Lacoste, supra, where, there having been no dismissal of the servant, the only breach of the contract consisted in the failure of the master to pay, when due, the wages or installments of wages actually earned. In those instances, the contract not having been broken by the dismissal of the servant, and he not having been prevented from performing his work, and the relation of master and servant still continuing, an action on the contract could be maintained to recover the salary or wages due for a past stated period. Keedy v. Long, 71 Md. 392, 18 Atl. Rep. 704. But a dismissal of the servant, or, differently stating the same thing, a refusal to allow him to continue to work, while not a rescission of the contract, is a breach of it that will authorize a recovery of damages for the whole injury which the servant may have sustained. And such a suit may be instituted though the time for the completion of the service has not elapsed. Keedy v. Long, supra. This conclusion does not involve an application or adoption of the principle laid down in Hochster v. De Latour, 20 Eng. Law & Eq. 157. The law of the case just cited relates to cases where there is a precontract for future services, or the performance of some act or duty at a future period, and where performance cannot be commenced, and was not by the contract contemplated, until that period arrives, and where the promisor, prior to that time, announces his intention not to abide by the contract. But that is not this case, where performance had been commenced, and the plaintiff was prevented by the defendants from further executing it.

But it is insisted the pending suit is not for damages for dismissing the plaintiff, but that it is an action on the contract to recover the plaintiff's salary for the five weeks following the one for which a recovery had been had before the justice of the peace. And the right to recover this salary as salary, and not as damages for a breach of the contract, is based upon the plaintiff's readiness and willingness to perform his work, and not upon his actual performance of it; in other words, he seeks to recover installments of salary for work which he never performed, and to recover them merely because he was willing to perform it, but was prevented from doing so. As thus presented, under a contract that is indivisible, and which covers a hiring for a whole year at a salary payable in weekly installments, it is a claim to recover for constructive services. Had the action been indebitatus assumpsit, it is conceded the doctrine of constructive service would be involved, but, as the suit is on an express contract prescribing the amount of each installment of the compensation, it is urged that the defendants are liable for the stipulated price of the services the plaintiff agreed to perform, but never did perform, and that they are liable, because the plaintiff was not permitted to perform them, though ready and willing to do so. In both indebitatus assumpsit and in an action on an express contract to recover wages for services which have not been performed, a recovery is sought for the amount that the plaintiff would have been entitled to recover had the services in fact been rendered; and such recovery is sought, not because the services have been rendered, but because the plaintiff was ready and willing to render them, and the defendant prevented him. In both instances, therefore, the readiness of the plaintiff to perform and the refusal of the defendant to allow a performance, constitute, when unearned wages are sued for, the ground of the actions, though the forms and the allegations of the pleadings are widely different. That which is sought to be recovered in both cases is the same thing, viz. wages as wages, though in the one case it is under the allegation of work and labor done, which allegation is attempted to be supported by the proof of a readiness and willingness to perform; and in the other it is under an allegation of a refusal to allow that work to be done which the plaintiff had agreed to do, and continued ready and willing to do. Salary as salary, definitely fixed and agreed to, and not a sum of money as unliquidated damages for a broken contract of hiring, is what is sued for under the declaration in the case at bar. It is a suit to recover wages, though no services have been rendered at all, and, if maintainable in that form, would preclude the defendants from showing by evidence that the plaintiff could have secured other similar employment during the time covered by the contract; because, if wages, distinctively as wages, can be recovered under such conditions, instead of damages for a wrongful discharge or dismissal, they must be recovered as specific, ascertained debts, the amount of which is fixed by the contract, and is in no way subject to abatement by circumstances which would reduce the damages in a suit founded on a refusal by the defendant to allow the plaintiff to perform his part of an indivisible contract of hiring. In other words, if under such a contract the plaintiff is entitled to recover wages as wages upon a mere offer to perform, he must be entitled to recover just precisely the wages named in the contract, even though he might have obtained other work of the same kind, at the same price, during the period for which he claims his wages under the contract. This would be recovering for constructive services. That doctrine has been altogether repudiated, both in England and in this country. Keedy v. Long, 71 Md. 389, 18 Atl. Rep. 704. "The doctrine of constructive service has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has not an action for wages, unless something is due for past services actually rendered; and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of indebitatus assumpsit." James v. Allen Co., supra; Howard v. Daly, 61 N. Y. 362,—where Gandell v. Pontigny, 4 Camp. 375, Thompson v. Wood, 1 Hilt. 96, and the cases in Alabama, Mississippi, and Wisconsin are distinctly disaffirmed, and the doctrine of constructive service declared to be "so opposed to principle, so clearly hostile to the great mass of authorities * * * that" it could not be accepted. We hold, then, that the contract declared on is entire and indivisible; that for the breach of it by the defendants in discharging the plaintiff before the expiration of the year, or in refusing to allow him to work, a right of action arose, not for unearned wages or salary, as such, but for damages for a breach of the contract, the measure of which damages would be the stipulated salary for the stipulated period of one year, less the amount the plaintiff actually earned, or might, by due and reasonable diligence, have earned, after his dismissal, (Jaffray v. King, 34 Md. 223;) that, as there was but one breach, but one action could be maintained therefor; that, having recovered before the magistrate in a suit founded on that breach,—for he could have lawfully recovered upon no other theory,—he is barred, upon the satisfaction of that judgment, from again suing on the same contract, because he could have recovered in one action all the damages he sustained, including that for which he now sues; and that, if the pending action be treated as a suit to recover for installments of salary under the contract, no services having been rendered by him, it must fail, because the services were never rendered, but were constructive. The plaintiff elected to sue before a justice of the peace for a portion of the amount he might have recovered had he claimed more and sued in a different forum, and he must abide the result of that election. He is not at liberty to split up his cause of action into fragments, and successively sue for each, when there has been but one breach of an entire and indivisible contract. As we agree with the court below, its judgment will be affirmed. Judgment affirmed, with costs in both courts.

BOLAND v. GLENDALE QUARRY CO.

(30 S. W. 151, 127 Mo. 520.)

Supreme Court of Missouri, Division No. 2.
March 18, 1895.

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Action by James Boland against the Glendale Quarry Company to recover damages for wrongful discharge. From a judgment for plaintiff, defendant appeals. Affirmed.

Chester H. Krum and Carl Otto, for appellant. W. B. Homer, for respondent.

GANTT, P. J. The plaintiff, on the 18th of January, 1890, entered into a written agreement with the defendant, whereby he was employed by defendant as superintendent of its quarries and stone business for a period of three years, beginning April 1, 1890, and ending March 31, 1893, at a salary of $2,000 for the first year, payable in monthly installments of $166.66; and at a salary of $2,250 for the second year, payable in monthly installments of $187.50; and at a salary of $2,500 for the third year, at $208.33 per month,—in consideration of which he was to devote his time, labor, and exclusive attention to the business of defendant, and advance its interest. Plaintiff entered upon his duties under the contract, and served until May 9, 1891, when he was discharged. He tendered his services, but defendant refused to accept them after his dismissal. He commenced this action on the 10th day of September, 1892, and prayed for $5,000 damages for breach of his contract. Defendant, in its answer, admits the contract, and denies each and every other allegation in the petition. It then pleads for further defense that plaintiff did not faithfully perform his duties, caused defendant much loss, and was discharged for failure to properly perform his duties; and further, that since his discharge he has obtained other employment, for which he has received more than he claimed from defendant. A reply was duly filed. The cause was tried January 9 and 10, 1894, and plaintiff obtained a verdict for $2,984.25, and judgment therefor, with costs. Defendant appeals.

1. The court, of its own motion, gave the following instruction on the measure of damages: "The court instructs the jury that, if they find their verdict for the plaintiff, they will fix their verdict for the whole amount that would have been due the plaintiff if he had continued work for the defendant under the contract sued upon from the date of his discharge until the expiration of the contract, after allowing credit for anything which the evidence shows plaintiff may have earned from services rendered to others, and after allowing a further credit of an amount equal to what the jury may believe, from the evidence, he will be able to earn between now and the 31st day of March, 1893." To which said action of the court defendant then and there at the time duly excepted. The defendant asked no instruction on the measure of damages whatever. In this court, counsel for defendant have assailed the instruction, because it permitted plaintiff to recover for the whole contract period, less his earnings up to the date of the trial and his prospective earnings to the end of the contract. The instruction substantially states the law as it has been settled in this state since Ream v. Watkins (1858) 27 Mo. 518. That case was followed and approved in Lambert v. Hartshorne (1877) 65 Mo. 549. In the last-mentioned case it was said: "In an action for wrongful discharge, brought before the expiration of the term, the general rule is that the measure of damages cannot exceed the contract price. Neither is it necessarily the contract price, for, as stated in Ream v. Watkins, 27 Mo. 516, a plaintiff may, after his dismissal, sue and recover judgment, and then obtain employment elsewhere, and receive for the residue of the term as much or more than by the broken contract he would have been entitled to if he had served his time out, * * * and therefore the measure of damages is a question for the jury under all the circumstances of the case." These cases were again quoted with approval in Ehrlich v. Insurance Co., 88 Mo. 257. In Pond v. Wyman, 15 Mo. 183, the rule and the reason for it was clearly stated: "It makes the contract price the measure of the plaintiff's recovery, unless the defendant, by evidence, shows that the damage actually sustained is less than the price agreed upon. This we regard as a sufficient concession to the person who has violated a contract by which he was bound to pay a certain price to another for services to be rendered. The plaintiff, who has been prevented by the act of the defendant from receiving the compensation agreed upon, when he is without default, is entitled to ask a full indemnity; and the onus of reducing the recovery is properly thrown upon the defendant. It is almost impossible to lay down any rule for this reduction that will be comprehensive enough to embrace all cases, and yet be particular and special enough to be of any practical utility. To the extent that the time of the plaintiff, which would be required to perform his contract, has been employed in business not more laborious, and equally profitable, it is evident that he would not be injured by the violation of the contract. Yet, to give him the full benefit of his contract, he must be entitled to the difference in advantage, in ease and profit, between the service he was to perform and the business substituted for that service, although his whole time may have been employed." In Miller v. Shoe Co., 26 Mo. App. 60, the St. Louis court of appeals reaffirms the rule in a case on all fours with this. Says the court: "The plaintiff's damage for breach of a contract of employment for a time certain is, prima facie, the

contract price agreed upon for his services. It is unquestionably his duty to use reasonable efforts to find other similar employment, if he can; but that he has obtained such employment, or that, by reasonable efforts, he might have obtained it, it is incumbent upon the defendant to show in mitigation of damages. Wood, Mast. & S. pp. 245, 246; Koenigkraemer v. Glass Co., 24 Mo. App. 124. In this case the trial took place more than six months after the discharge, and within one and one-half months prior to the expiration of the contract time of service. The plaintiff had given evidence in full of his efforts to obtain similar employment, after his discharge, and prior to the trial, in St. Louis, Bloomington, Chicago, Rochester, and Cincinnati, all of which efforts proved unavailing. He was thoroughly competent to judge of the probabilities as to whether similar efforts in the month and a half yet remaining would meet with any success. That he assumed the burden of proof on this subject is a matter of which the defendant is in no position to complain." And the doctrine has been very fully gone over in the recent case in the Kansas City court of appeals of Halsey v. Meinrath, 54 Mo. App. 341, in the following language: "The suit was brought before the expiration of the term of the contract for which plaintiff alleges he was employed. A servant wrongfully discharged may treat the contract of hiring and service as continuing, and bring a special action against the master for breaking it by discharging him; and this remedy he may pursue whether his wages are paid up to the period of his discharge or not. Ream v. Watkins, 27 Mo. 516. And the general rule in cases of this kind is that the measure of damages cannot exceed the contract price; neither is it necessarily the full contract price, for it may be that the plaintiff, after his dismissal, may sue and recover a judgment, and then obtain elsewhere employment, and receive for the residue of the term much more than by the contract he would have been entitled to if he had served out his term. The damages must depend upon the kind of services to be performed and the wages to be paid, and allowance should be made for the time that would probably be lost before similar employment could be obtained. In some pursuits it may be almost certain that the dismissal of a person at a particular season will throw him entirely out of employment for the residue of the year, whilst in other pursuits similar employment could readily be obtained elsewhere on better terms; and therefore the amount of the damages is a question for the jury under all circumstances. Lambert v. Hartshorne, 65 Mo. 551. * * * But it is suggested that the plaintiff could only recover such damages as had resulted at the time of the commencement of the suit. This is an error. The plaintiff was entitled to such damages as accrued up to the expiration of his term of service in a case like this, where the damages were of a continuing character. Lally v. Cantwell, 40 Mo. App. 50; Miller v. Shoe Co., 26 Mo. App. 61; Ream v. Watkins, supra; Lambert v. Hartshorne, supra. We must indulge every presumption in support of the judgment." Both of the appellate courts have followed the decisions of this court, and a rule so long established should not be disturbed save for the most cogent reasons. No error was committed in the instruction, upon the facts in evidence. It gave the jury full latitude to allow defendant every deduction to which it could be entitled under the law. The plaintiff's evidence of his effort to obtain other employment was uncontradicted, and the jury credited defendant not only with what he had received, but what he would likely receive to the end of the term of service.

2. The competency of plaintiff was conceded on the trial, and there was no error in assuming a fact that defendant did not controvert in his pleadings. Defendant nowhere in its instructions questioned the competency of plaintiff. It tendered the sole issue that he had not faithfully performed his duties.

3. Appellant has not pointed out any error in the admission or exclusion of evidence. The verdict is not excessive, and is evidently for the right party. The judgment is affirmed.

BURGESS and SHERWOOD, JJ., concur.

STARK v. PARKER.

(2 Pick. 267.)

Supreme Judicial Court of Massachusetts.
Suffolk and Nantucket. March
Term, 1824.

Exceptions from court of common pleas, Suffolk and Nantucket counties; Strong, Judge.

Assumpsit by John Stark against Thomas Parker for labour performed on defendant's farm. Judgment for plaintiff. Defendant brings exceptions. Reversed.

H. H. Fuller, for plaintiff. B. Sumner, for defendant.

LINCOLN, J. This case comes before us upon exceptions filed, pursuant to the statute, to the opinion in matter of law of a judge of the court of common pleas before whom the action was tried by a jury; and we are thus called upon to revise the judgment which was there rendered. The exceptions present a precise abstract question of law for consideration, namely, whether upon an entire contract for a term of service for a stipulated sum, and a part performance, without any excuse for neglect of its completion, the party guilty of the neglect can maintain an action against the party contracted with, for an apportionment of the price, or a quantum meruit, for the services actually performed. Whatever may be the view properly taken of the contract between the parties in the case at bar, the point upon which it was ruled in the court below embraced but this single proposition. The direction to the jury was, "that although proved to them, that the plaintiff agreed to serve the defendant for an agreed price for a year, and had voluntarily left his service before the expiration of that time, and without the fault of the defendant, and against his consent, still the plaintiff would be entitled to recover of the defendant, in this action, a sum in proportion to the time he had served, deducting therefrom such sum (if any) as the jury might think the defendant had suffered by having his service deserted." If this direction was wrong, the judgment must be reversed, and the case sent to a new trial, in which the diversity of construction given to the character and terms of the contract by the counsel for the respective parties may be a subject for distinct consideration.

It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law, that doubts should ever have been entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek, through their instrumentality, impunity or excuse for the violation of them. And it is no less repugnant to the well established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it. The true ground of legal demand in all cases of contracts between parties is, that the party claiming has done all which on his part was to be performed by the terms of the contract, to entitle him to enforce the obligation of the other party. It is not sufficient that he has given to the party contracted with, a right of action against him. The ancient doctrine on this subject, which was carried to such an absurd extent as to allow an action for the stipulated reward for a specified service, under a total neglect of performance, leaving the other party to his remedy for this neglect by an action in turn, has been long since wisely exploded, and the more reasonable rule before stated, in late decisions, is clearly established.

Upon examining the numerous authorities, which have been collected with great industry by the counsel for the plaintiff, it will be found, that a distinction has been uniformly recognized in the construction of contracts, between those in which the obligation of the parties is reciprocal and independent, and those where the duty of the one may be considered as a condition precedent to that of the other. In the latter cases, it is held, that the performance of the precedent obligation can alone entitle the party bound to it, in his action. Indeed the argument of the counsel in the present case has proceeded entirely upon this distinction, and upon the petitio principii in its application. It is assumed by him, that the service of the plaintiff for a year was not a condition precedent to his right to a proportion of the stipulated compensation for that entire term of service, but that upon a just interpretation of the contract, it is so far divisible, as that consistently with the terms of it, the plaintiff having laboured for any portion of the time, may receive compensation pro tanto. That this was the intention of the parties is said to be manifest from the fact found in the case, that the defendant from time to time did in fact make payments expressly toward this service. We have only to observe upon this point in the case, that however the parties may have intended between themselves, we are to look to the construction given to the contract by the court below. The jury were not instructed to inquire into the meaning of the parties in making the contract. They were instructed that if the contract was entire, in reference alike to the service and the compensation, still by law it was so divisible in the remedy, that the party might recover an equitable consideration for his labour, although the engagement to perform it had not been fulfilled. The contract itself was not discharged; it was considered as still subsisting, because the loss sustained by the defendant in the breach of it was to be estimated in the assessment of damages to the plaintiff. A proposition apparently more objectionable in terms can hardly be stated, and if supported at all it must rest upon the most explicit authority. The plaintiff sues in indebitatus assumpsit as though there was no special contract, and yet admits the existence of the contract to affect the amount he shall recover. The defendant objects to the recovery of the plaintiff the express contract which has been broken; and is himself charged with damages for the breach of an implied one which he never entered into. The rule that expressum facit cessare tacitum is as applicable to this, as to every other case. If the contract is entire and executory, it is to be declared upon. Where it is executed and a mere duty to pay the stipulated compensation remains, a general count for the money is sufficient. Numerous instances are indeed to be found in the books of actions being maintained where the specific contract has not been executed by the party suing for compensation, but in every case it will be seen that the precise terms of the contract have been first held, either to have been expressly or impliedly waived, or the non-execution excused upon some known and settled principle of law. Such was the case in Burn v. Miller, 4 Taunt. 745, Thorpe v. White, 13 Johns. 53, and in most of the cases cited by the plaintiff's counsel in which the decision was had upon considering the obligation of the party to execute the contract, and not upon the construction of the contract itself. Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.

That such a contract as is supposed in the exceptions before us expresses a condition to be performed by the plaintiff precedent to his right of action against the defendant, we cannot doubt. The plaintiff was to labour one year for an agreed price. The money was to be paid in compensation for the service, and not as a consideration for an engagement to serve. Otherwise, as no precise time was fixed for payment, it might as well be recovered before the commencement of the labour or during its progress, as at any subsequent period. While the contract was executory and in the course of execution and the plaintiff was in the employ of the defendant, it would never have been thought an action could be maintained for the precise sum of compensation agreed upon for the year. The agreement of the defendant was as entire on his part to pay, as that of the plaintiff to serve. The latter was to serve one year, the former to pay one hundred and twenty dollars. Upon the construction contended for by the plaintiff's counsel, that the defendant was to pay for any portion of the time in which the plaintiff should labour, in the same proportion to the whole sum which the time of labour done should bear to the time agreed for, there is no rule by which the defendant's liability can be determined. The plaintiff might as well claim his wages by the month as by the year, by the week as by the month, and by the day or hour as by either. The responsibility of the defendant could thus be affected in the manner totally inconsistent with the terms of his agreement to pay for a year's service in one certain and entire amount. Besides a construction to this effect is utterly repugnant to the general understanding of the nature of such engagements. The usages of the country and common opinion upon subjects of this description are especially to be regarded, and we are bound judicially to take notice of that of which no one is in fact ignorant. It may be safe to affirm, that in no case has a contract in the terms of the one under consideration, been construed by practical men to give a right to demand the agreed compensation, before the performance of the labor, and that the employer and employed alike universally so understand it. The rule of law is in entire accordance with this sentiment, and it would be a flagrant violation of the first principles of justice to hold it otherwise.

The performance of a year's service was in this case a condition precedent to the obligation of payment. The plaintiff must perform the condition, before he is entitled to recover anything under the contract, and he has no right to renounce his agreement and recover upon a quantum meruit. The cases of McMillan v. Vanderlip, 12 Johns. 165, Jennings v. Camp, 13 Johns. 94, and Reab v. Moor, 19 Johns. 337, are analogous in their circumstances to the case at bar, and are directly and strongly in point. The decisions in the English cases express the same doctrine (Waddington v. Oliver, 2 Bos. & P. [N. R.] 61; Ellis v. Hamlen, 3 Taunt. 52); and the principle is fully supported by all the elementary writers.

But it has been urged, that whatever may be the principle of the common law, and the decisions in the courts in New York on this subject, a different rule of construction has been adopted in this commonwealth, and we are bound to believe that such has sometimes been the fact, from the opinion of the learned and respectable judge who tried this cause, and from instances of similar decisions cited at the bar, but not reported. The occasion of so great a departure from ancient and well-established principles cannot well be understood. It has received no sanction at any time from the judgment of this court within the periods of our Reports. As early as the second volume of Massachusetts Reports, page 147, in the case of Faxon v. Mansfield, the common-law doctrine in relation to dependent covenants was recognized and applied, and in several subsequent cases it has been repeated and uniformly adhered to. The law indeed is most reasonable in itself. It denies only to a party an advantage from his own wrong. It requires him to act justly by a faithful performance of his own engagements, before he exacts the fulfilment of dependent obligations on the part of others. It will not admit of the monstrous absurdity, that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it. Any apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the labourer from his engagement, to the sacrifice of his wages, is wholly groundless. It is only in cases where the desertion is voluntary and without cause on the part of the labourer, or fault or consent on the part of the employer that the principle applies. Wherever there is a reasonable excuse, the law allows a recovery. To say that this is not sufficient protection, that an excuse may in fact exist in countless secret and indescribable circumstances, which from their very nature are not susceptible of proof, or which, if proved, the law does not recognize as adequate, is to require no less than that the law would presume what can never legally be established, or should admit that as competent, which by positive rules is held to be wholly immaterial. We think well established principles are not thus to be shaken, and that in this commonwealth more especially, where the important business of husbandry leads to multiplied engagements of precisely this description, it should least of all be questioned, that the labourer is worthy of his hire, only upon the performance of his contract, and as the reward of fidelity.

The judgment of the court of common pleas is reversed, and a new trial granted at the bar of this court.

BRITTON v. TURNER.

(6 N. H. 481.)

Supreme Court of New Hampshire. Cheshire. July Term, 1834.

Exceptions from Cheshire county.

Mr. Wilson, for plaintiff. Mr. Handerson, for defendant.

PARKER, J. It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit? Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover any thing for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. Stark v. Parker, 2 Pick. 267; Faxon v. Mansfield, 2 Mass. 147; McMillan v. Vanderlip, 12 Johns. 165; Jennings v. Camp, 13 Johns. 94; Reab v. Moor, 19 Johns. 337; Lantry v. Parks, 8 Cowen, 63; Sinclair v. Bowles, 9 Barn. & C. 92; Spain v. Arnott, 2 Starkie, 256. That such a rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance,—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage,—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non fulfillment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract.

Another illustration is furnished in Lantry v. Parks, 8 Cow. 83. There the defendant hired the plaintiff for a year, at ten dollars per month. The plaintiff worked ten and a half months, and then left saying he would work no more for him. This was on Saturday. On Monday the plaintiff returned and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the defendant on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result. It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. 2 Starkie, Ev. 97, 98; Hayward v. Leonard, 7 Pick. 181; Smith v. First Cong. Meeting House in Lowell, 8 Pick. 178; Jewell v. Schroeppel, 4 Cow. 564; Hayden v. Inhabitants of Madison, 7 Greenl. 78; Bull. N. P. 139; 4 Bos. & P. 355; Linningdale v. Livingston, 10 Johns. 36; Jennings v. Camp, 13 Johns. 97; 7 East, 479.

A different doctrine seems to have been holden in Ellis v. Hamlen, 3 Taunt. 52, and it is apparent, in such cases, that if the house has not been built in the manner specified in the contract, the work has not been done.

The party has no more performed what he contracted to perform, than he who has contracted to labor for a certain period, and failed to complete the time.

It is in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which it is held he cannot do.

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it,—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value, whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation, that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house.

Where goods are sold upon a special contract as to their nature, quality, and price, and have been used before their inferiority has been discovered, or other circumstances have occurred which have rendered it impracticable or inconvenient for the vendee to rescind the contract in toto, it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered by a cross action damages for the breach of the contract. "But according to the later and more convenient practice, the vendee in such case is allowed, in an action for the price, to give evidence of the inferiority of the goods in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefits which the defendant has actually derived from the goods; and where the latter has derived no benefit, the plaintiff cannot recover at all." 2 Starkie, Ev. 640, 642; Okell v. Smith, 1 Starkie, 107.

So, where a person contracts for the purchase of a quantity of merchandise, at a certain price, and receives a delivery of part only, and he keeps that part, without any offer of a return, it has been held that he must pay the value of it. Shipton v. Casson, 5 Barn. & C. 378; Com. Dig. tit. "Action" (F); Barker v. Sutton, 1 Camp. 55, note. A different opinion seems to have been entertained, Waddington v. Oliver, 2 Bos. & P. (N. R.) 61; and a different decision was had, Walker v. Dixon, 2 Starkie, 281.

There is a close analogy between all these classes of cases, in which such diverse decisions have been made. If the party who has contracted to receive merchandise, takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor, in part under similar circumstances, should pay the value of what has been done for his benefit.

It is said, that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance.

If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished.

We have no hesitation in holding that the same rule should be applied to both classes of cases, especially, as the operation of the rule will be to make the party who has failed to fulfill his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320c; 2 Starkie. Ev. 643.

It is as "hard upon the plaintiff to preclude him from recovering at all, because he has failed as to part of his entire undertaking," where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labour actually performed.

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labour, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. Taft v. Inhabitants of Montague, 14 Mass. 282; 2 Starkie, Ev. 644.

But, if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane, Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. Farnsworth v. Garrard, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

In fact, we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that, the contract being entire, there can be no apportionment; and that, there being an express contract, no other can be implied, even upon the subsequent performance of service,—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions the one precedent to the other, without a specific proviso to that effect. Boone v. Eyre, 1 H. Bl. 273, note; Campbell v. Jones, 6 Term R. 570; Ritchie v. Atkinson, 10 East, 295; Burn v. Miller, 4 Taunt. 745.

It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretence for a recovery if he volutarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction (Wadleigh v. Sutton, 6 N. H. 15); and, in estimating the value of the labor, the contract price for the service cannot be exceeded (Hayden v. Inhabitants of Madison, 7 Greenl. 78; Dubois v. Canal Co., 4 Wend. 285; Koon v. Greenman, 7 Wend. 121).

If a person makes a contract fairly he is entitled to have it fully performed; and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non performance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non fulfilment of the contract.

If in such case it be found that the damages are equal to or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions.

There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance whatever, they may be. Crowninshield v. Robinson, 1 Mason, 93, Fed. Cas. No. 3,451.

And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for farther damages.

Applying the principles thus laid down, to this case, the plaintiff is entitled to judgment on the verdict. The defendant sets up a mere breach of the contract in defence of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct; that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appeared to have allowed a pro rata compensation, for the time which the plaintiff labored in the defendant's service. As the defendant has not claimed or had any adjustment of damages, for the breach of the contract, in this action, if he has actually sustained damage he is still entitled to a suit to recover the amount.

Whether it is not necessary, in cases of this kind, that notice should be given to the employer that the contract is abandoned, with an offer of adjustment and demand of payment; and whether the laborer must not wait until the time when the money would have been due according to the contract, before commencing an action (2 Bos. & P. [N. R.] 61), are questions not necessary to be settled in this case, no objections of that nature having been taken here.

Judgment on the verdict.

SWIFT v. HARRIMAN.

(30 Vt. 607.)

Supreme Court of Vermont. Orange. March Term, 1858.

Assumpsit for the breach of a contract by the defendant, to carry on the plaintiff's saw mill. The defendant filed a plea in offset, but this plea was not filed so early as was required by the rules of the court where the cause was tried. After this plea was filed, and before any objections had been made to it by the plaintiff, the cause was referred by the consent of the parties, and tried by the referees, and at the hearing before them the plaintiff objected to the defendant's demand in offset, among other reasons, upon the ground that the plea in offset was not filed in season. The referees, however, considered the defendant's claim in offset, which was for his labor and earnings during the time he carried on the mill, and reported the facts in the case, which are sufficiently set forth in the opinion of the court. They found that the plaintiff was entitled to recover of the defendant fifteen dollars for the breach of the contract declared on, and that the defendant was entitled to recover of the plaintiff, upon his claim in offset, the sum of thirty-two dollars and ninety-two cents, and they accordingly reported that the defendant recover of the plaintiff seventeen dollars and ninety-two cents (being the difference between the defendant's claim above stated, *608 *and the plaintiff's damages by reason of the breach of the contract), and costs. The county court rendered judgment for the defendant upon the report, to which the plaintiff excepted.

A. M. Dickey, for the plaintiff.

————, for the defendant.

The opinion of the court was delivered by

ALDIS, J. The question whether the plea in offset was filed within the time prescribed by the rules of court, can not properly be raised after a reference of the case, and a hearing before the referees. Even if out of time, the court might have suspended the rule and admitted the plea. The objection must be held as waived by the reference.

The contract between the plaintiff and the defendant, as stated in the report, was this: a verbal contract by which the defendant was to carry on the plaintiff's saw mill for one year, make all repairs costing one dollar or less at any one time, run the mill all the time from the 1st of March to the 1st of May, and from the fall till the 1st of March, 1854, and between the first of May and fall, when there was water enough, and do all the work in a good workmanlike manner, and to receive fifty cents per thousand for soft lumber sawed, and one-third of the hard lumber for sawing the same, and to take his pay out of the money received for sawing, and out of the hard lumber.

In September, 1853, the plaintiff dismissed the defendant from the charge of the mill, on the ground that he did not do the work in a good workmanlike manner, and the defendant left. The referees find that the defendant did not do his work in a good workmanlike manner, and as this suit is brought to recover the damages occasioned to the plaintiff by such breach of the contract, the referees assess such damages at the sum of fifteen dollars.

The defendant pleads in offset his claim for the balance due him for his labor and earnings during the time he carried on the mill.

The plaintiff objects to any allowance to the defendant for such earnings, upon the ground that the contract was the mere hiring of a servant for a specific period of time, and that he was discharged for good cause.

*609 *The contract in this case we can not deem the mere hiring of a servant. It was an agreement of a different character, in which the defendant assumed liabilities for repairs of the mill, had a share in its profits, and in fact, was put in possession of, and had, to some extent, an interest in real estate. He was not to receive any fixed sum as wages, but was to have a proportion of the profits of the business he carried on. It was a contract for the control and carrying on of a mill for a year.

Similar contracts are frequently made as to the carrying on of farms on shares. In such cases, the contracts have never been held mere agreements by the tenants to labor as hired servants.

Neither does it belong to that class of contracts where the stipulations are intended to be a condition precedent, and there can be no recovery without a complete performance. The agreement on the part of the defendant was not for such an entire thing that the whole must be done before he would be entitled to recover; on the contrary, the terms of the contract show that both parties intended the defendant should take his pay out of the earnings of the mill as they accrued.

This case seems to come within the reason of those cases, of which there are many in our reports, where upon equitable considerations growing out of the contract and its part performance, a recovery for the real beneficial value of the labor has been allowed.

The defendant's labor was beneficial to the plaintiff. Compensation to the plaintiff for what he suffered from the breach of contract by the defendant was easily to be ascertained, has been assessed, and can be deducted from the beneficial value to the plaintiff of the deant's labor.

It would be highly unjust for the plaintiff to take advantage of the defendant's failure to perform some one particular in his contract, so as not only to put an end to the contract, but to put all the earnings of the defendant into his own pocket, and deprive the defendant of any compensation for his work.

The decisions in Dyer v. Jones, 8 Vt. 205; Gilman v. Hall, 11 Vt. 510; Bracket v. Moore, 23 Vt. 554; and Morrison v. Cummings, 26 Vt. 486, establish the right of the party to recover on a *quantum meruit*, in cases where a compensation can be made, and the stipulations are not intended as a condition precedent.

The judgment of the county court is affirmed.

MACY v. PEACH.

(44 Pac. 687, 2 Kan. App. 575.)

Court of Appeals of Kansas, Northern Department, C. D. April 3, 1896.

Error from district court, Osborne county. Action by C. W. Peach against J. C. Macy in a justice court. Judgment for plaintiff, and defendant appeals to the district court. Judgment for plaintiff, and defendant brings error. Affirmed.

Robinson & McBride, for plaintiff in error. Israel Moore and W. N. Moore, for defendant in error.

CLARK, J. About the 1st of March, 1891, a verbal contract was entered into between one Henry Glodfelty and the plaintiff in error, J. C. Macy, whereby the former agreed to work for the latter, on his farm in Osborne county, for a term of nine months at the stipulated wages of $17 per month. Glodfelty went to work under this contract on March 4th and remained with Mr. Macy until July 8th, and then, without any sufficient reason therefor, and over Macy's objection, quit and refused further to comply with the terms of his contract. Glodfelty was a minor stepson of C. W. Peach, the defendant in error, and the latter brought an action before a justice of the peace to recover the balance of the wages claimed to be due his stepson. The case was subsequently taken to the district court, where amended bills of particulars were filed by both parties, and a trial was duly had before the court, a jury being waived, resulting in a finding in favor of the plaintiff for the amount claimed by him "less the damages sustained by the defendant in the sum of $18.69, to wit, that plaintiff should recover of the defendant the sum of $45.26; the damages allowed being the difference between the per diem paid the employé, Glodfelty, and $2 per day, the amount per diem the court considered a proper compensation for which additional help could be employed, as needed, to take the place of said employé during harvest." The defendant excepted to the finding of the court; filed his motion for a new trial, setting forth all the statutory grounds therefor, which was overruled, the defendant duly excepting; and judgment was rendered in favor of the plaintiff for $45.26. The defendant seeks a reversal of this judgment.

The only assignment of error to which particular attention is called by counsel is that the court erred in its finding as to the damages which the defendant below sustained through the breach of the contract by Glodfelty, and it is claimed that, under the evidence, the plaintiff in error was entitled to damages under his counterclaim, and that there was no evidence in the case to warrant the finding of the damages that were assessed by the trial court as having been sustained by the plaintiff in error. In his counterclaim, the defendant alleged the breach of the contract, and that the defendant was unable to get help to take the place of Glodfelty, and could not, therefore, get his work done, wheat harvested, nor corn properly tilled, nor stock properly cared for, whereby he was damaged in the sum of $500. The defendant in error claims that, as this action was originally brought before a justice of the peace, the district court, on appeal, had no jurisdiction of this counterclaim, it exceeding the sum of $300. Had this objection been interposed in the trial court, the cases of Ball v. Biggam, 43 Kan. 327, 23 Pac. 565, and Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. 631, would be authorities supporting such contention; but, as no objection was there made, the defendant in error cannot be permitted, in this court, for the first time, to object to the jurisdiction of the trial court to hear and determine such counterclaim. Gregg v. Garverick, 33 Kan. 190, 5 Pac. 751.

Did the court err in refusing to allow the defendant damages under his counterclaim? In Walrath v. Whittekind, 26 Kan. 482, it is said that "damages recoverable upon breach of contract are only those damages which are the direct and proximate result of the wrong complained of. Damages which are remote and speculative cannot be recovered." While the defendant may have suffered loss by reason of Glodfelty's misconduct, still it must be remembered that the law does not hold one liable for all the consequences that may follow the breach of his contract. If it were so, his liability would be without a limit, for it would continue as far as the consequences of his act could be traced. The law wisely limits liability to the direct and immediate effects of the breach of a contract. The losses set up in defendant's counterclaim are not of this character. They may have resulted remotely from the fact that Glodfelty failed to remain with the plaintiff in error as a "farm hand" for the full period of nine months, but they cannot be said to be the natural and proximate consequence of the breach of the contract of employment. Fuller v. Curtis, 100 Ind. 237; Jackson v. Hall, 84 N. C. 489; McDaniel v. Crabtree, 21 Ark. 431; Johnson v. Mathews, 5 Kan. 118. In support of the contention of plaintiff in error that the court erred in assessing his damages, our attention has been called to the case of Houser v. Pearce, 13 Kan. 104, in which the plaintiff recovered a judgment for damages for breach of a specific contract to cut, bind, and stack certain oats, and the supreme court held that if the plaintiff, after using all reasonable precaution, lost his crop by reason, solely, of the failure of the defendants to perfrom their contract, he was clearly entitled to recover the amount of such loss; and, as the record did not include the evidence, the court held that the presumption was that the instruction given of which complaint was made was warranted by the evidence.

There is, however, quite a noticeable distinction between that case and this one. Here, the contract between the parties was not made with any special reference to the harvesting of the defendant's wheat crop, nor to the cultivation of any particular field of growing corn; but, on the contrary, it is fair to presume that the work expected to be performed by him was general in its nature, such as is usually required of a "farm hand," and it cannot fairly be supposed that the damages alleged in the counterclaim were within the contemplation of the parties to this contract when it was executed, nor could such damages naturally be expected to follow a violation of the contract. The evidence in support of the damages sustained by the defendant below, as alleged in his bill of particulars, is very unsatisfactory. Instead of being recitals of fact, the testimony of the several witnesses amounts only to expressions of opinion as to the damages which the defendant sustained, and was clearly incompetent. But we do not think the defendant below was entitled to recover the damages alleged by him in his counterclaim. In Peters v. Whitney, 23 Barb. 24, this identical question was before the court, and it was there held that "in an action for the breach of a contract for work and labor to be done upon a farm, evidence of damage occurring to the plaintiff's crops in consequence of the defendant's leaving his service is inadmissible. The legal measure of damages in such cases is the difference between the wages agreed to be paid to the defendant, and the price the plaintiff was obliged to pay for labor to supply his place." In Riech v. Bolch, 68 Iowa, 526, 27 N. W. 507, it is said that, "where one employed by a farmer, for a given term, abandons his employer before the end of the term, in the midst of haying, the damages sustained by the employer in the loss of hay are too remote to be recovered in an action for a violation of the contract." In that case, the defendant offered to prove that, when plaintiff left his service, he had a large quantity of hay in the shock, and that he had a quantity of uncut hay in the field, and that he was unable to employ other help to save such hay, and that it was lost in consequence of plaintiff's refusal to continue in his service during the remainder of the term of his employment; and also offered to prove the value of the hay at the time the plaintiff quit his services. This evidence was excluded by the district court, on the ground that it did not afford the proper measure of damages. The supreme court, in sustaining this ruling, held that "it cannot be said that the injury complained of is the natural and proximate consequence of plaintiff's breach of the contract." In the case of Houser v. Pearce, supra, the trial court refused an instruction to the jury that the measure of damages was the difference between the contract price and what it would have cost to have had the work done by others; and the supreme court, speaking through Mr. Justice Brewer, says that "this instruction states what would, perhaps, be the ordinary rule for the measure of damages."

This is the rule laid down in Peters v. Whitney, supra, which the trial court evidently sought to apply; but the record, as stated by plaintiff in error, is entirely silent as to the amount which would probably be necessary to pay for additional help to take the place of Glodfelty during harvest, except that, after the latter left Macy, he was employed by Mr. Smith at $1.25 a day; but whether the court erred in estimating the damages of the plaintiff in error in this respect is immaterial, as any error therein inured to the benefit of the plaintiff in error. We think, from an examination of the entire record, that the plaintiff in error has failed to point out any prejudicial error therein, and that the judgment should be affirmed. All the judges concurring.

HARVEY v. CONNECTICUT & P. R. R. CO.

(124 Mass. 421.)

Supreme Judicial Court of Massachusetts. Suffolk. May 25, 1878.

Report from supreme judicial court, Suffolk county; Colt, Judge.

R. D. Smith, for plaintiff. C. T. Russell and C. T. Russell, Jr., for defendant.

ENDICOTT, J. The defendant agreed in writing with the plaintiff to transport lumber from certain stations on the Grand Trunk Railway, in Canada, to Boston, at a certain rate of freight, for a period of twelve months from August 31, 1871. This agreement constituted a continuing offer, on the part of the defendant, to transport such lumber as the plaintiff should furnish at the specified points during the period named, and was binding on the defendant whenever, during that time, the plaintiff tendered lumber for transportation according to its terms; and failure to transport the lumber afterwards offered by the plaintiff was a breach of the contract. Bornstein v. Lans, 104 Mass. 214.

It also appeared that the plaintiff informed the company, at the time, that he desired to make this contract, because he wished to make contracts with other persons to sell and deliver railroad ties in Boston. He afterwards made contracts with two railroads for the delivery of ties in Boston. He notified the defendant for the first time in May or June, 1872, that he had made such contracts, and demanded transportation for a portion of these ties to Boston, under his contract. This the defendant failed to do. As the plaintiff had made no contracts for the delivery of ties in Boston at the time when the defendant entered into the agreement to transport, and no notice was or could then have been given of the character and terms of those contracts, we are of opinion that the defendant cannot be held liable in damages for the profits which would have accrued to the plaintiff under such subsequent contracts. Such damages could not have been in the contemplation of the parties when they made their contract, as a probable result of a breach of it.

When a carrier receives goods for transportation, and fails to deliver them, the owner is entitled to recover the market value of the goods at the time and place at which they should have been delivered. Spring v. Haskell, 4 Allen, 112. And where the carrier negligently delays the delivery of goods, he is liable for loss in their market value during the delay. Cutting v. Railway Co., 13 Allen, 381. It is said in that case that this "is the most simple and just rule, as well as the easiest to be applied; for it depends on the general market value of the goods, and involves no question of contingent or speculative profits, and no consideration of any other contracts made or omitted to be made by the plaintiff in view of his contract with the defendant. To refer to such other contracts, or the profits which might have resulted from them, not within the knowledge or contemplation of the defendant, would be to hold him liable for the consequences, or allow him the benefit, not of his own contract with the plaintiff, but of dealings between the latter and third persons, with which the defendant had nothing to do."

If, therefore, the defendant had received the ties for transportation according to its contract, and failed to deliver them at all, it would have been liable for their market value in Boston at the time when they should have been delivered; or if it had negligently delayed the delivery, it would have been liable for the diminution in their market value during the delay. It would not, in either event, have been liable in damages for loss of profits sustained by the plaintiff under his subsequent contracts with other parties; unless it can be said that, by reason of the plaintiff's announcement that he intended to make such contracts, it was necessarily within the contemplation of the parties when they made the contract of transportation, and as the probable consequence of its breach, that the defendant might be liable for damages resulting to the plaintiff from his inability to fulfill such contracts, the terms of which were not and could not then be disclosed.

The damages, for which a carrier is liable upon failure to perform his contract, are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation; and a larger liability can be imposed upon him, only when it is in the contemplation of the parties that the carrier is to respond, in case of breach, for special and exceptional damages. In such a case, the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant, that the plaintiff intended to make contracts for the sale of the ties to be transported, cannot impose a liability upon the defendant for loss of profits on such contracts. Whether there would be a loss of profits, it was of course then impossible to determine, and probable profits would be incapable of estimation. If the defendant is liable in this case for such possible or probable profits, then every carrier who is informed, when he takes goods for transportation, that the shipper intends to sell them, is liable, upon failure to perform his contract, for loss to the shipper in his dealings with other parties, with which the carrier has nothing to do, and the result of which it is impossible for him to anticipate. Scott v. Steamship Co., 106 Mass. 468. This would be to introduce a new and uncertain element of liability into the contract, and we are not aware of any authority which goes to that extent.

In Hadley v. Baxendale, 9 Exch. 341, the owners of a mill sent a broken shaft by a carrier, as a pattern to a manufacturer, to make a new shaft, and at the time informed the carrier that the mill was stopped, and the shaft must be delivered immediately. The carried delayed its delivery for an unreasonable time, in consequence of which the owners did not receive the new shaft until some days after they should have received it, and were unable to work their mill for want of it, and thereby incurred a loss of profits. But it was held that such loss could not be recovered, on the ground that it could not reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as a probable result of a breach of it, that there would be necessarily a loss of profits.

In Horne v. Railway Co., L. R. 7 C. P. 583, the plaintiffs were under a contract to supply a quantity of military shoes at a certain day, in London, at an unusually high price. They were delivered to the defendant, with notice that the plaintiffs were under a contract to deliver the shoes on that day, and unless they were so delivered, they would be thrown upon their hands; but no notice was given of the terms of the contract. The defendant, a common carrier, failed to deliver them within the time. The plaintiff claimed as damages the difference between the price at which they had contracted to sell the shoes, and the price which they ultimately brought. But it was held that they were not entitled to recover that sum, the damage not being the natural consequence of the defendant's failure to perform its contract, and the defendant not having had notice that the sale was at an exceptional price.

This question has been considered in numerous cases, and it is sufficient to say that the principle upon which Hadley v. Baxendale was decided is now well established, though some of the dicta of Baron Alderson, in delivering the judgment, have been the subject of criticism. Horne v. Railway Co., L. R. 8 C. P. 131, 133, 141; Gee v. Railway Co., 6 Hurl. & N. 211; Borries v. Hutchinson, 18 C. B. (N. S.) 445; Railway Co. v. Redmayne, L. R. 1 C. P. 329; Wilson v. Dock Co., L. R. 1 Exch. 177 184, 186; Woodger v. Railway Co., L. R. 2 C. P. 318; Sawmill Co. v. Nettleship, L. R. 3 C. P. 499; Cory v. Ironworks Co., L. R. 3 Q. B. 181. See, also, Waters v. Towers, 8 Exch. 401, and Baron Parke's observation thereon in Hadley v. Baxendale, 9 Exch. 349.

We are therefore of opinion there was error in instructing the jury that the plaintiff could recover damages for loss of profits on his subsequent contracts. As the ties were not sent to Boston, the true measure of damages is the difference between the market price in Boston and the market price in Canada at the time when the defendant should have transported the ties according to its contract, deducting therefrom the price stipulated in the contract for transportation.

Verdict set aside.

WARD'S CENTRAL & PACIFIC LAKE CO. v. ELKINS.

(34 Mich. 439.)

Supreme Court of Michigan. October Term, 1876.

Error to superior court of Detroit.

Moore, Canfield & Warner, for plaintiff in error. Alfred Russell, for defendant in error.

CAMPBELL, J. Elkins recovered damages against the plaintiff in error for failure to carry certain salt from Bay City to Chicago in November, 1874. Elkins was a salt dealer in Chicago, and sued upon an alleged contract whereby the plaintiff in error was to carry three cargoes of salt, of about seventeen thousand bushels in all, only one of which was taken. The cargoes were to be called for from the 15th to the 20th of November. The regular business of plaintiff in error was between Buffalo and Duluth, with power, as was claimed, to do business elsewhere on the lakes.

Elkins gave evidence tending to show that he could not get vessels to carry the salt after plaintiff's default. He had it taken by rail to Chicago in lots as he wanted it, from January to some time in April, 1875, and was allowed to recover the difference between the price agreed on with plaintiff and what he paid for the transportation by rail. This is the chief error complained of.

We do not see upon what rule this recovery can be justified. The damage to which Elkins was entitled, if any, would be such as would have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such. The only advantage he could have gained by a timely shipment according to contract would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more.

He would not have been justified in procuring shipment by rail, if the railroad process would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account. Le Blanche v. Railway Co., 1 C. P. Div. 286.

When such a necessity exists, it is maintained only as a necessity, and allowed because of its urgency. If such a rule is ever applicable, it cannot be satisfied by allowing a party, instead of seeking other means of carriage immediately at hand, to await his leisure and speculate on future chances and make shipments piecemeal, as was done here.

It is altogether likely that after the close of navigation, and as the winter goes on, prices may rise so as to warrant shipments by rail, when this would not have been profitable earlier; and it may be possible, after paying railroad rates, to make as much profit as if the salt had been received by steam on the lakes and put in market in the fall at fall rates. It would be absurd to say that these deliberate winter shipments were necessitated or justified by a failure to get shipping facilities during the season, or near the close of navigation in November. It would be equally unjust to allow the owner of the salt to speculate on the chances of a market without risk to himself.

The rule of damages should have been as previously indicated, and should in no case exceed the damages actually incurred. A party who has lost nothing by a breach of contract, is not entitled to damages of a substantial character.

We think there was also error in allowing the statements of a steamboat clerk, who was not shown to occupy any position of general agency, to be received in evidence to bind the company; and that improper questions were allowed, which called for the inferences of a witness rather than the actual terms of the contract in suit.

But we do not enlarge upon these, as they are not likely to arise again, and the main issue is upon the question of damages, and the real terms of the agreement, as absolute or conditional.

The judgment must be reversed, with costs, and a new trial granted. The other justices concurred.

DEVEREUX v. BUCKLEY et al.

(34 Ohio St. 16.)

Supreme Court of Ohio. Dec. Term, 1877.

Action by J. P. Buckley & Co. against Devereux, receiver of the Atlantic & Great Western Railroad. A judgment for plaintiff in the common pleas was affirmed in the district court, and defendant moves for leave to file a petition in error. Motion overruled.

Durbin Ward, for the motion. Wm. E. Imes, opposed.

GILMORE, J. The action in the court of common pleas was not brought upon any express or special contract, but to recover damages for a breach of an implied agreement to carry, and deliver at the place of consignment, a large lot of eggs, within a reasonable time, by a common carrier.

By failing to answer, the defendant (plaintiff in error) admitted the breach as alleged.

On an inquiry of damages, the court, against the objection of the defendant, permitted testimony to go to the jury tending to prove the market value of eggs at the place of consignment on the day they ought to have been delivered, and their value at that place on the day they were actually delivered, and that their value was less on the latter than on the former day.

Counsel for the plaintiff in error contends that the court erred in admitting this testimony to go to the jury, on the ground that the defendant "is only bound to make good the loss which is the natural and legitimate result of his failure to comply with his contract"; and that a loss arising from a depreciation in the market value of eggs at the place of delivery, in consequence of his breach of the contract, is not a natural or legitimate result of such breach.

In support of this proposition, counsel relies very much upon the leading English case of Hadley v. Baxendale, 9 Exch. 341. The rule laid down in that case for the ascertainment of damages in cases of breach of contract is divided into two alternative heads. Under the first of these, damages are to be allowed which would arise naturally, or according to the usual course of things from the breach of the contract; and, under the second, those which may fairly be supposed to have been contemplated by the parties as the probable result of such breach.

The case before that court fell under the first of these heads, as will appear from the following language, taken from the opinion: "Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants, at the time the contract was made, were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person?"

And the court was of the opinion that, under those circumstances, the profits of the mill, which were lost in consequence of the breach of the contract to deliver the broken shaft, which was to be used as a pattern for a new one, within a reasonable time, did not constitute such damages as would arise naturally, or according to the usual course of things, from the breach of the contract.

But we do not think that the facts and circumstances of the case before us bring it under the first, but on the contrary, for reasons that will be stated below, we think it clearly falls under the second, of the alternative heads in Hadley v. Baxendale, and that the plaintiffs were entitled to recover such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.

The proposition, as thus stated, is fully sustained by an abundance of authority. Ward v. Railroad Co., 47 N. Y. 29; Scott v. Steamship Co., 106 Mass. 468; Sedg. Dam. (6th Ed.) 79; Id. note, 81; Field, Dam. § 375; Griffin v. Colver, 16 N. Y. 489; Cutting v. Railway Co., 13 Allen, 381.

In view of the doctrine as settled by these authorities, it may be safely said that if a common carrier is chargeable with knowledge that the article carried is intended for the market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, in the absence of any special contract, constitute the measure of damages.

Was the carrier chargeable with such notice in this case? We think he was. The anxiety of the plaintiffs to obtain quick time on their shipments of eggs, which was communicated to the defendants' agent, shows that, for some reason, they regarded "time" as an important element in the shipments. The agent, for some reason, appreciated the necessity for quick time in the contemplated shipments; named a time within which he could carry the eggs over his part of the route, and requested to be kept advised by telegraph, so that he might give the eggs his special attention when they reached the point at which he was to receive them. Why this preconcerted arrangement? With the knowledge of business, which their avocations must have put them in possession of, both parties knew that when large quantities of eggs were being shipped to a great city, they were usually, if not always, intended for the market at such city. And the reason why both parties recognized the necessity of quick time in the transportation of the article, was that they undoubtedly knew that in this country the market value of eggs was liable to decline at the season of the year in which the shipment was made in this case, and the damages consequent upon such a decline must have been in the contemplation of both parties at the time the contract was made. Motion overruled.

McGREGOR et al. v. KILGORE.

(6 Ohio, 359.)

Supreme Court of Ohio. Dec. Term, 1834.

This cause was adjourned in Hamilton county. It came before the court upon a special verdict. The action was case upon a bill of lading, dated July 5, 1832, for certain parcels of merchandise consigned to the plaintiffs, shipped on board the steamboat Chesapeake, to be delivered at Cincinnati in good order (the danger of the river alone excepted); "but in case of the water not admitting the boat to proceed to Louisville, the owners of the goods to pay the expense of reshipping to that place from the point where they are reshipped, and the captain agrees they shall be forwarded without any delay." Breach, that through the carelessness and negligence of the defendant, the goods were lost.

Plea, not guilty; notice that the low water would not permit the boat to go up to Louisville, and, therefore, the goods were landed at Trinity, near the mouth of the Ohio, and were injured after they were so landed. The jury returned a special verdict, finding:

(1) The execution of the bill of lading, the shipment of a cask of cutlery to be delivered in Cincinnati according to the bill of lading, and the delivery of the cask in an injured state at Cincinnati.

(2) That the amount of the injury upon the sterling cost and insurance is $419.24; the amount exclusive of insurance, $389.24; the amount, adding sixty per cent. to the sterling cost, $622.78; the amount, predicated on the value at Cincinnati, and the proceeds of sale, $789.58.

(3) That the said cask of cutlery was landed at Trinity, at the mouth of the Ohio, and left in charge of the defendant,—the boat having returned to New Orleans,—was placed under a temporary shed erected for the purpose, near the river, and several days afterward, while the boat hands were attempting to remove it to another place of deposit adjoining, the cask, being large and heavy, slipped away from the workmen, and rolled into the Ohio river, and damaged the goods by the wetting.

And if upon these facts the court is of opinion the law arising is with the plaintiffs, they find the defendant guilty, and assess the plaintiffs' damages to the amount of either of the sums returned, which in law is the true rule of damages, with interest to be counted and added as in law is right. But if the court shall be of the opinion that, upon the facts there is no legal right in the plaintiff to recover, then the jury find the defendant not guilty.

It was a conceded matter at the trial that the goods were landed because the water in the Ohio river was too low for the Chesapeake to ascend to Louisville.

After the goods were landed at Trinity, the defendant wrote to the plaintiffs notifying them of the fact, and asking advice as to the shipment up. The following answer was sent to the letter:

"Cincinnati, August 14, 1832.

"Capt. Kilgore—Dear Sir: Your favor of the ——— instant, came duly to hand. You wish to know if you shall forward our freight to Louisville at fifty cents per one hundred pounds.

"We do not wish it sent at such a high freight. There is now a rise of water which will enable any of the common boats to get to Louisville with considerable freight on board. Our loading is of such a heavy nature as will not allow the present high rates of freight. You will please to send it up as soon as you think the freight is at as low a rate as it will be at before the fall rise—say, twenty or twenty-five cents per one hundred pounds to Louisville. We are not very much in want of it. We hope there is no additional expense accrued at Trinity on the goods.

"We understand there was some of our freight sent to Louisville some time ago; say, when the Chesapeake arrived last. We have not yet received it, nor have we heard from it. We hope, however, that the present rise of water will enable you to forward all the freight at fair prices. You will please engage it all the way to Cincinnati if you can.

"Respectfully, your most obedient servants.

"J. McGregor & Co."

B. Storer, for plaintiffs. E. S. Haines, for defendant.

WRIGHT, J. It was not contended on the trial before the jury, nor is it now insisted, but the water in the Ohio river was so low when the Chesapeake arrived at its mouth as not to admit of her proceeding to Louisville. There was no dispute then, nor is there any now, that the letter in evidence was written by the plaintiffs to the defendant, and received by him at Trinity after the goods were landed there. I therefore take these two facts as a part of this case, though not included in the finding of the jury.

The bill of lading was a contract to carry from New Orleans to Cincinnati, and deliver to the plaintiffs there in good order, with privilege to the carrier in the case of low water to reship for Louisville in some other craft, and charge the increased expense of such reshipment to the consignee. The first point presented, it appears to us, is, did the landing of these goods at Trinity in order for their reshipment, put an end to the defendant's connection with them as carrier under the contract, and convert him into a warehouse keeper and forwarder? There seems no necessity for inquiring into the custom of the river when goods are transshipped, to land and protect them by temporary warehouses, if none other can be had, until a suitable craft arrive to take the lading up the river. The bill of lading gave the carrier the privilege of forwarding the goods on other craft than that in which they were shipped in one event, and it seems to us the right to land may be conceded as incident to the shipment without at all affecting the questions before the court. It was but a privilege to the carrier, in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of the freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at their destined port and delivery, unless that relation has been interrupted by some act of the owner or consignee. In that possible view of the case the letter alluded to was read in evidence. It is now claimed that that letter constituted the defendant the agent of the plaintiffs, and put an end to his duties as carrier. There is nothing in the case, and there was no evidence on the trial, to show that this letter was received by the defendant before the accident to the goods. If, therefore, the receipt of the letter was admitted to affect what the defendant urges, a state of things is not shown in this case in which the letter can bear upon the injury. The utmost that could be claimed for this letter, if received before the jury, would be to exonerate the carrier from injury while the goods were detained, under the letter, for lower rates of freight. It cannot reach back to influence an injury which the goods received immediately after they were landed, and before the letter was received, or perhaps written. The defendant had these goods, as carrier, when they were injured, and is subject to the law of carriers. "A common carrier warrants the safe delivery of goods in all but the excepted cases of the act of God and public enemies." Elliott v. Rossell, 10 Johns. 7. A carrier, in taking freight, is bound to use sound and proper hands and machinery for lading and unlading, and the safe handling and removing the goods; and if loss ensue from the failure in any particular, the carrier must bear it. Abb. Shipp. 259; 1 Wils. 282; 1 Doug. 278. The injury in this case resulted from the want of machinery to remove heavy articles, or the carelessness, inattention, or want of strength in the hands employed.

It remains, then, only to inquire into the proper rule of damages in the case. The goods were delivered at Cincinnati in an injured condition. The carrier earned full freight for their transportation. It would seem to be the dictate of natural justice that the person liable for their safe delivery should make good to the owner the injury they sustained while under his care and control. The owner was entitled to the goods at Cincinnati in their perfect state. But for the act of the defendant he would have had them in that condition. The carrier, in case he deliver the goods at the port of delivery, earns, and is entitled to demand full freights, notwithstanding they have been partially injured, and the consignee must look to his bill of lading for indemnity. In New York the rule is established that the measure of damage is the value of the goods at the port of delivery. Amory v. McGregor, 15 Johns. 38; Bracket v. McNair, 14 Johns. 171. The supreme court of Pennsylvania, upon full examination, held it best to remove from the carrier all temptations to fraud, and that was best done by making him liable for the value of goods lost at the place of delivery, and established that as the rule of damages in such cases, founded upon authority, general convenience, and good policy. Gillingham v. Dempsey, 12 Serg. & R. 186. These authorities are not shaken by those cited by the defendant. We think this is obviously the rule of law and justice. The jury have returned two valuations looking to this point:

(1) The value, adding sixty per cent. to the sterling cost, as the usual mercantile estimate in Cincinnati, to cover the charges, freight, and insurance from Liverpool.

(2) The actual value of the goods in Cincinnati, deducting therefrom the proceeds of the goods, sold in their injured condition.

Which of these furnishes the rule of damages is the question? The first is the usual mode of ascertaining the net cost of such goods in Cincinnati. In the absence of other evidence, that would be taken as the value of the goods. But when the actual value is found, the supposed or presumed value yields. That is the case here, the jury have assessed the damages, as predicated on the actual, as well as the supposed value, the actual value measures the real injury, and is the rule of damage.

Judgment for the plaintiff for that sum, with interest.

NOTE. See, also, Hadley v. Baxendale, ante, 116; Thomas, Bagley & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co., ante, 149; and Mather v. Express Co., ante, 135.

BROWN et ux. v. CHICAGO, M. & ST. P. RY. CO.

(11 N. W. 356, 911, 54 Wis. 342.)

Supreme Court of Wisconsin. Jan. 10, 1882.

Appeal from circuit court, Juneau county.

D. S. Wegg, for appellant. J. W. Lusk, for respondents.

TAYLOR, J. The cause of action in this case will be best stated by giving a copy of the complaint, which sets forth fully the facts upon which a recovery is sought. After stating the incorporation of the defendant, and alleging that it was a common carrier of passengers in this state, it proceeds as follows: "That said plaintiffs, on or about the second day of October, 1879, desired to go to Mauston, aforesaid, from the said village of Kilbourn City, and for that purpose bought and paid about $2.30 for tickets at Kilbourn City, from the agent of said defendant, to convey said plaintiffs to Mauston and return to Kilbourn City, whereby it became the duty of said defendants, as carriers of passengers, to carry the said plaintiffs from Kilbourn City to Mauston in their passenger train which left Kilbourn City to go to Mauston at about 6:20 p. m. of said day, and to treat said plaintiffs in a respectful manner, and carry them to the proper and usual landing place at Mauston, to wit, the depot of said defendant at said place. That the said defendant wholly disregarded its said duty in the premises, and its contract and obligations to and with said plaintiffs, and, when about three miles east of the depot of the defendant at the said village of Mauston, informed said plaintiffs, by its proper agents and servants, that they had arrived at Mauston, aforesaid, and stopped the train for them to get off. That said plaintiffs, supposing and believing they had arrived at Mauston, as they were informed they had by the defendant's servants, as aforesaid, alighted from the defendant's train, and the said train passed on. That after said train had left them they perceived that they were not at the Mauston depot, and did not know where they were. That it was quite dark. That they supposed and believed that they were near the Mauston depot, and proceeded up the track in the direction of Mauston, as they supposed, expecting in a few moments to arrive at the Mauston depot. That, instead of being near the Mauston depot, they found afterwards they were not, but, on the contrary, had been carelessly and negligently put off the defendant's train by its servants about three miles east of said depot, apparently in the country; and the plaintiffs knew not otherwise, but supposed and believed that they had got to walk west on the track of the defendant until they came to some station. After walking on the track of the defendant about three miles they came to the said village of Mauston; the said plaintiff Mary A. Brown being, by reason of said long walk, very tired and exhausted, sick and prostrated, passing the balance of the night in a very restless, uneasy, and feverish condition. That previous to the said second day of October, 1879, and leaving Kilbourn City, as aforesaid, the said plaintiff Mary A. Brown had been a healthy, well, and robust person, and at the time of taking said walk was pregnant with child. That in consequence of being carelessly and negligently put off the cars of the defendant, as aforesaid, and her said walk, she became sick, ailing, and very much enfeebled, and continued getting worse, although using the best of care and medical attendance, until about December 20, 1879, when she lost her child. That for a long time the said plaintiff Mary A. Brown was seriously and dangerously ill, so much so that her life was greatly endangered and despaired of, and she suffered, had suffered, continued to suffer, great pain in body and mind; and the said plaintiff Orange Brown, her husband, suffered personally great anxiety of mind, and was put to great expense and trouble in care, nursing, help, and medical attendance and medicines."

The defendant's answer was a general denial only. In the court below the plaintiffs recovered, among other things, for the alleged injury to Mrs. Brown.

Upon this appeal the learned counsel for the railway company insist that the damages claimed for the sickness of the wife, and for her medical attendance and care, are too remote to constitute a cause of action, and that it was error on the part of the court below not to take that part of the case from the jury.

The first position taken by the learned counsel for the appellant is that the cause of action set out in the plaintiffs' complaint is for a breach of contract, and not an action in tort. Upon this point we cannot agree with the appellant. We think the gravamen of the action is the negligence and carelessness of the appellant's agents and employés in directing the plaintiffs to leave the train before they had arrived at the end of their journey. They did not leave at a place short of their destination knowing that fact, but through the neglect of the appellant's employés they were induced to leave the train short of their journey's end, supposing that they had reached it. It is true, the plaintiffs in their complaint state that they paid their fare and went on board the train as passengers, to be carried from one point to another upon the appellant's road, and that by reason of such payment and entry upon that train it became the duty of the appellant to carry them from the point of starting to their destination. These facts are, perhaps, sufficient to constitute a contract on the part of the appellant to safely carry them to their destination. Still, it is necessary in all actions against a carrier of passengers to state facts which show the right of the party to be carried before he can complain of any breach of duty on the part of the carrier in not conveying them safely, or in not carrying them to their destination. The complaint in this case is not so much that the plaintiffs were not carried to their destination, but that on the way the appellant's employés carelessly and negligently induced them to quit the train before they arrived at their destination, and that in consequence of such wrong on the part of the appellants they suffered damage. It is the negligence in putting the plaintiffs off the train before the journey was completed which is complained of, and not a breach of the contract for not carrying them to the end of their journey.

We see no reason for distinguishing this case from the class of cases which hold a railway company liable in tort for an injury done to a passenger, while traveling on a train, caused by collision, the breaking down of a bridge, or from any defect in the road or cars. All these matters are a breach of the contract to carry the passenger safely, yet the carrier is held liable, in an action of tort, for any injury sustained, based upon the allegation that it was incurred through the carelessness and negligence of the company. All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the carelessness and negligence of the company the ground of his right of recovery; and if he proceed for the tort it becomes necessary on the part of the plaintiff to show that he stands in the relation of a passenger of the carrier, in order to show his right to recover damages for the negligence of the carrier in not discharging his duty in carrying him safely. Where the relation of passenger and carrier exists, the law fixes the duty of the carrier towards the passenger, and any violation of that duty is a wrong; and if injury occurs to the passenger from such wrong, the carrier is responsible and must make good the damage resulting therefrom. Wood v. Railway Co., 32 Wis. 398; Walsh v. Railway Co., 42 Wis. 23; Craker v. Railway Co., 36 Wis. 657–675, and cases cited. In this case we deem it material to determine whether the action is an action for a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination.

The plaintiffs claim, and the evidence shows, that they and their child, about seven years old, were directed to leave the cars, by the brakeman, at a place some three miles east of Mauston, being told at the time that it was Mauston, their place of destination. When they left the cars it was night; it was cloudy, and had rained the day before; that there was a freight train standing on a side track where they were put off the train; no platform, and no lights visible except those on the freight train; that plaintiffs soon ascertained that they were not at Mauston, and did not know where they were. They did not see the station-house, although there was one, but it was hid from their view by the freight train standing on the side track. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston and arrived there late at night, Mrs. Brown quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the walk Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston.

The important question in the case is whether the appellant is liable for the injury to Mrs. Brown, admitting that it was caused by her walk to Mauston. Whether the sickness of Mrs. Brown was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is, therefore, conclusive upon this point. Admitting that the walk caused the miscarriage and sickness of the plaintiff Mrs. Brown, it is insisted by the learned counsel for the appellant that the appellant is not liable for such injury; that it is too remote to be the subject of an action; that the negligence and carelessness of the defendant's employés in putting the plaintiffs off the cars at the place they did was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor.

To sustain this position of the learned counsel for the appellant reliance is placed upon the case of Walsh v. Railway Co., 42 Wis. 23, and it is insisted that there can be no real distinction made between that case and this. Upon a careful examination of that case it will be seen, we think, the court did distinguish between an action which was purely an action for a breach of contract and one in tort. In that case the learned circuit judge charged the jury as follows: "If you find that the failure to return to Madison on the day in question, at the time agreed upon in the contract, was caused directly by orders from the headquarters and principal manager of the railway company, made with the full knowledge that the plaintiff and the other excursionists were ready and waiting to be carried home according to the arrangement made therefor, and made in wilful disregard of the rights of the plaintiff and the other excursionists, subordinating their rights to the convenience of the company, when they had the means at hand readily to have fulfilled their duty; in short, that the conduct of the company was wilful and oppressive,—then you may give full compensatory, though not punitive, damages, embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong as you find was the immediate result of the misconduct, and must necessarily and reasonably have been expected to arise therefrom to the plaintiffs as one of the excursionists." This instruction was excepted to, and this court held the instruction erroneous, and reversed the judgment for that cause.

The present chief justice, who wrote the opinion in the case, takes special pains to show that the action was based solely upon a breach of contract, and was in no sense an action of tort, and he expressly declares that the rule of damages is not the same where the action is for a breach of contract as for a tort. Upon this point he uses the following language: "It will be seen that the circuit court was requested to charge that the plaintiff was only entitled to recover such damages as naturally and fairly resulted from the breach of contract, but could not recover damages for the disappointment of mind, sense of wrong, or injury to his feelings by reason of such breach. This rule the learned circuit judge disaffirmed, holding that if the conduct of the company was wilful and oppressive, then such injury to health, annoyance, and vexation of mind, mental distress, and sense of wrong as were the immediate result of the misconduct, and must reasonably have been expected to arise therefrom to the plaintiff, were proper matters to be considered in giving compensatory damages. This was confounding the important distinction, so far as the rule of damages is concerned, between an action in tort and one upon contract. It was, in fact, applying to this case the rule which was laid down in Craker v. Railway Co., 36 Wis. 657, in an action for a tort committed by an agent of the company. In the case of wrongs the jury are permitted to consider injury to feelings and many other matters which have no place in questions of damages for a breach of contract."

The chief justice then quotes at large from the case of Hobbs v. Railway Co., 10 L. R. Q. B. 111, with approval. In that case the English court of appeals held that when the railway company had neglected or refused to carry the plaintiffs to their destination, and they were compelled to get out at a station about five miles from it, late at night, and being unable to get a conveyance or accommodation at an inn they walked home a distance of five miles in the rain, and the wife caught cold and was sick as a consequence of the walk and exposure, they could not recover for the injury to the wife. It would seem, from the opinions given by the learned judges in the Hobbs Case, that they treated the action as an action upon contract and not an action for a tort. All the judges speak of it as an action to recover for the breach of contract to carry the plaintiffs to their destination.

The rule as to what damages may be recovered in actions for breach of contract is laid down by this court in the case of Candee v. Telegraph Co., 34 Wis. 479, cited from Hadley v. Baxendale, 9 Exch. 341, and approved. It is as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The latter part of this rule, as above quoted, would seem to cover all cases of breach of contract; for it must be presumed that the parties would reasonably be supposed to have contemplated that the party injured by the breach of the contract would sustain such damages as would fairly and substantially, in the usual course of things, result from such breach. And so it is often said that, in an action for a breach of contract, the damages to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties when they made it. Under this rule the damages which may be recovered in an action for the breach of a contract are sometimes more remote and far-reaching than those recoverable for a tort.

In the case of Richardson v. Chynoweth, 26 Wis. 656, is an illustration of the rule. In that case the court say: "In such cases, where the controlling party is advised of the special purpose of the thing to be completed, and of the damage that would naturally accrue from failure to complete it at the specified time, and in view of this expressly stipulates to finish it at a given time, there is no reason why he should not be responsible for such damage as is the direct natural result of his failure, even though beyond the mere difference between the contract and market price." See Shepherd v. Gaslight Co., 15 Wis. 318; Flick v. Wetherbee, 20 Wis. 392.

In many cases of breach of contract the courts have by their decisions established a rule of damages which is applicable to all of a class. In an action for a breach of contract to pay money at a fixed time, the damages are the lawful interest on the money withheld, from the time it was payable to the date of the judgment, unless the contract expressly stipulates for other damages. So, in actions for a breach of a covenant of warranty of title, the damages are limited, ordinarily, to the purchase money paid and interest. In these and other classes of cases the damages are fixed by arbitrary rules; but still the general rule above stated, that the damages are such as "would reasonably be supposed to have been contemplated that the party injured by the breach of the contract would sustain," would apply to such cases; for, in contracts of the classes above mentioned, the parties would enter into them knowing the law fixing the damages for the breach, and so they would be supposed to have contemplated the payment of such damages in a case of breach and no other.

In the case of Hobbs v. Railway Co., supra, the learned justices state the rule in case of breach of contract in more concise language. They say: "Such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it." Under this rule it was held in the Hobbs Case, and by this court in the Walsh Case, that in an action for a breach of contract in failing to carry a passenger to his destination damages could not be recovered for injury to the health, annoyance, and vexation of mind and mental distress, on the ground that such damages were not such as the parties making the contract would contemplate as likely to result from its breach.

We are not disposed now to question the correctness of the decision made by this court in the case of Walsh v. Railway Co., supra, limited as that case was to an action solely for a breach of contract. In such cases the wilfulness of the party in refusing to fulfil the contract does not in any way change the rule of damages. The rule as to the damages in actions upon contract is the same whether the breach be by mistake, pure accident, inability to perform it, or whether it be wilful and malicious. The motives of the party breaking the contract are not to be inquired into. 1 Sedg. Meas. Dam. 439 et seq., and cases cited.

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedg. Meas. Dam. 130, note; Eten v. Luyster, 60 N. Y. 252; Hill v. Winsor, 118 Mass. 251; Lane v. Atlantic Works, 111 Mass. 136; Keenan v. Cavanaugh, 44 Vt. 268; Little v. Railroad Co., 66 Me. 239; Collard v. Railway Co., 7 Hurl. & N. 79; Hart v. Railroad Corp., 13 Metc. (Mass.) 99, 104; Wellington v. Oil Co., 104 Mass. 64; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277; Salisbury v. Herchenroder, 106 Mass. 458; Perley v. Railroad Co., 98 Mass. 414; Kellogg v. Railway Co., 26 Wis. 223; Patten v. Railway Co., 32 Wis. 524, and 36 Wis. 413; Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Vanderbilt, 34 How. Prac. 144; Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713. These cases, and many more which might be cited, clearly establish the doctrine that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly from such trespass or wrong, whether such damages might have been foreseen by the wrong-doer or not.

As stated by Justice Colt in the case of Hill v. Winsor, 118 Mass. 251: "It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence."

In the case of Bowas v. Tow Line, supra, Judge Hoffman, speaking of the rule in relation to damages on a breach of contract, as contrasted with the rule in case of wrongs, says: "The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable he must make compensation for it."

The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrong-doer should in fact intend but slight injury, and deal a blow which in ninety-nine cases in a hundred would result in a trifling injury, and yet by accident produced a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrong-doer from the consequences of his act. The real question in these cases is, did the wrongful act produce the injury complained of? and not whether the party committing the act would have anticipated the result. The fact that the act of the party giving the blow is unlawful renders him liable for all its direct evil consequences.

This was the substance of the decision in the old and often-cited squib case of Scott v. Shepherd, 2 W. Bl. 892. Justice Nares there says that "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and in this view of the case all the judges agreed, although they differed upon the question as to the form of the action.

In the case at bar the question to be determined is whether the negligent act of the defendant's employés in putting the plaintiffs and their child off the train in the night-time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must in considering this case take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of, and the negligence of the defendant in putting them off the cars was the mediate cause. We think the question, whether there was any negligence on the part of the plaintiffs in taking the walk, was properly left to the jury, as a question of fact, and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey.

The fact that there was a station-house near by, at which they might have found shelter until another train came by, is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must, therefore, be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And, we think, under the rules of law, the defendant must be liable for the direct consequence of the journey. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and, on account of the state of health of the parties, in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that if the plaintiffs had been of more robust health they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequence of the walk as though its employés had full knowledge of that fact. This court expressly so held in the case of Stewart v. City of Ripon, 38 Wis. 584, and substantially in the case of Oliver v. Town of La Valle, 36 Wis. 592.

Upon the findings of the jury in this case it appears that the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that on account of the peculiar state of health of Mrs. Brown at the time she was injured by such walk. There was no intervening independent cause of the injury other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stage-coach, who, supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and, not having acted negligently, it was held he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger. Jones v. Boyce, 1 Starkie, 493. The ground of the decisions is very aptly and briefly stated by Lord Ellenborough in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

So in the case at bar the defendant, by

its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause, and it is its proximate cause, within the rules of law upon that subject. The true meaning of the maxim, causa proxima non remota spectatur, is probably as well defined by the late Chief Justice Dixon in the case of Kellogg v. Railway Co., supra, as by any other judge or court. He states it as follows: "An efficient adequate cause being found, must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result."

In the case of Railway Co. v. Kellogg, 94 U. S. 469, the court say: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. * * * In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Within this definition the negligence of the defendant was the proximate cause of the injury to Mrs. Brown, as there was no other cause not incident to such negligence which intervened to cause the same.

There is, I think, but one case cited by the learned counsel for the appellant which appears to be in direct conflict with this view of the case, except those which relate to breaches of contract, and that is Car Co. v. Barker, 4 Colo. 344. This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of Stewart v. City of Ripon and Oliver v. Town of La Valle, supra. This decision is, it seems to me, neither supported by the principles of law nor humanity. It in effect says that if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrongdoer because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions.

In the case of Sharp v. Powell, L. R. 7 C. P. 253, the defendant was not held liable in an action of tort under the following circumstances: He unlawfully washed a van in the street, and the water ran down the gutter towards a grating leading to the sewer. In consequence of the extreme cold weather the grating was obstructed with ice, so that the water could not escape, and so spread out and froze over the causeway, which was badly paved and rough, and there froze. The plaintiff's horse, while being led past the spot, slipped upon the ice and was lamed. The action was brought to recover for the injury to the horse, and because it was shown that the defendant did not know that the grate was stopped so that the water could not escape, he was held not liable. This case comes within the rule above stated; there was an intervening and independent agency which caused the forming of the ice in the street, and the consequent injury, viz. the frozen condition of the grate, of which he was ignorant, and for which he was in no way responsible.

The cases of Railway Co. v. Birney, 71 Ill. 391, and Francis v. Transfer Co., 5 Mo. App. 7, were both cases similar to the one at bar, but both cases were decided in favor of the defendants, because it was held by the court that the plaintiffs, after being wrongfully left by the defendants short of their journey's end, were guilty of gross negligence in their manner of attempting to complete the journey, and so were not entitled to recover. I should say, from the reasoning of the judges in both these cases, that the judgment would have been for the plaintiffs had there been no fault on their part, and an injury had occurred to them in prosecuting the journey not arising from their fault, or the fault of a third person.

In the case of Phillips v. Dickerson, 85 Ill. 11, the defendant was doing no wrong to the plaintiff, and, so far as the case shows, was unconscious of her existence at the time. It was an exceptional case.

It would extend this opinion to too great length to undertake any review of the almost infinite number of cases in which the question of remote or proximate causes is discussed. No general and fixed rule can be laid down to govern all cases. It is said by the supreme court of the United States in Railway Co. v. Kellogg, supra: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." And similar language was used by this court in the case of Patten v. Railway Co., 32 Wis. 524–535. In that case the present chief justice says: "At all events, we think the question was properly submitted to the jury to determine, whether under all the circumstances the failure of the company to have a light at the depot on the arrival of the train was the direct and proximate cause of the accident."

We think that all the objections made by the learned counsel for the appellant to the right of the plaintiffs to recover for the injury to the health of Mrs. Brown were overruled by this court in the cases of Oliver v. Town of La Valle and Stewart v. City of Ripon. In the Oliver Case the injury complained of was like that in the case at bar. The only difference in the two cases is that in the Oliver Case the evidence connecting the injury with the negligence of the defendant was more satisfactory than in the case at bar. But the question of the conclusiveness of the evidence is one for the jury, and they have settled that question in favor of the plaintiffs. In the Oliver Case the negligence of the town caused the defendant's horses to fall through and get entangled in a bridge in the highway, which rendered it necessary that the plaintiff should make exertions to free the horses from their difficulty, and such exertions caused the injury complained of. It is the same in the case at bar, only not as plain in its circumstances. The negligence of the defendant put the plaintiffs in a situation which rendered it necessary for them to make an exertion to get out of such difficulty, and in doing so the plaintiff Mrs. Brown was injured, the same as Mrs. Oliver in the other case.

The case of Stewart v. City of Ripon settles the other question, that the peculiar condition of Mrs. Brown at the time is no defense to her claim for damages.

The objection made that the verdict should be set aside because the evidence shows a want of care on the part of the plaintiffs, and that the injury resulted from such want of care after the walk to Mauston, was clearly a question of fact for the jury. It does not appear from the record that any instruction upon this point was asked for by either party on the trial. There is, therefore, no error upon this point on the instruction. The evidence is not so clear that the damage was caused by the subsequent neglect of the plaintiff to procure proper medical attendance as would justify this court in setting aside the verdict as against the evidence.

The judgment of the circuit court is affirmed.

COLE, C. J., and LYON, J., dissent.

On Rehearing.

April 5, 1882.

TAYLOR, J. Although the learned counsel for the appellant has made a very vigorous, not to say denunciatory, attack upon the opinion filed in this case, we do not deem it proper to deviate from our ordinary rule of denying the motion for rehearing without comment, when no questions are raised or argued upon such motion which were not fully argued at the original hearing. In denying this motion we deem it proper to say that the intimation of the learned counsel for the appellant that this case was not thoroughly argued at the original hearing, or carefully considered by the court before the opinion was delivered, is hardly just either to the counsel or the court. Certainly, on the part of the court, we intended to give it that careful consideration which its importance demanded, and we are not conscious that we have failed in our duty in that respect, and after reading the very carefully prepared brief submitted by the learned counsel for the appellant, and hearing his clear and forcible oral argument at the original hearing of this case, we think he does injustice to himself in suggesting that the points decided were not thoroughly argued at such hearing.

NOTE. See Vosburg v. Putney, ante, 165, and Lewis v. Railway Co., ante, 182.

MacKAY v. OHIO RIVER R. CO.

(11 S. E. 737, 34 W. Va. 65.)

Supreme Court of Appeals of West Virginia. June 24, 1890.

Error to circuit court, Ohio county.

V. B. Archer and *Robert White*, for plaintiff in error. *J. O. Pendleton*, for defendant in error.

BRANNON, J. This was an action of trespass on the case, in the circuit court of Ohio county, brought by Winfield S. MacKay against the Ohio River Railroad Company, resulting in a verdict and judgment for the plaintiff for $539.17, to which judgment this writ of error was granted on the petition of said company. An inspection of the declaration will raise the question whether it states a cause of action *ex contractu* or *ex delicto*; whether it is in *assumpsit* on a contract for transportation, or for tort for the ejection of the plaintiff from a car. It avers that the defendant company undertook and promised, for certain hire and reward paid to it, to safely and securely convey the plaintiff in its cars from the town of Ravenswood to Wheeling, and back again to Ravenswood, and that the plaintiff, confiding in such promise and undertaking of defendant, did take a seat as a passenger, in the defendant's car, and was conveyed to Wheeling, and that afterwards, still confiding in such promise and undertaking of the defendant, he took a seat as a passenger in one of its cars to be conveyed back from Wheeling to Ravenswood; but the defendant, not regarding its promise and undertaking, but contriving to injure the plaintiff, did not convey him from Wheeling to Ravenswood, but neglected and refused so to do. Thus far the declaration seems to be based on the contract of conveyance made by the defendant, as a carrier, with the plaintiff. But it then immediately avers that, instead of so conveying the plaintiff, the defendant, by its servants, violently and with great force caused the plaintiff, against his will and protest, to be ejected from said car, and to be pushed and hurled from it upon the ground, and to be prevented from going to Ravenswood on that day, by means whereof he was compelled to walk a long distance to a hotel, was greatly humiliated in his feelings and hurt in his pride, by being exposed to other passengers on the car, and was compelled to remain in Wheeling, from his business and home, and to pay hotel bills, and spend three or four dollars for telegrams sent to his wife, to allay her uneasiness on account of his failure to reach home when expected, and to spend money to purchase a ticket to reach home, and to borrow money for that purpose, and that his wife was ill, and her alarm from his failure to reach home when expected injured her, and protracted her illness, causing him to pay large medical bills, and that his business was damaged by his detention from home, and he sustained numerous other injuries, to his damage $10,000. The most of this matter relates to the tort of ejecting the plaintiff from the cars, and looks to that as the cause or *gravamen* of the action. The declaration thus contains matter based on the contract, and matter based on the tort; and it is somewhat difficult to say whether it aims to state the breach of the contract to convey, or the tort in ejecting him from the car, as the *gravamen* of the action. But it cannot be treated as double in nature. It must be classed either as an action *ex contractu* or *ex delicto*. The writ summons the defendant to answer an action of trespass on the case, and the declaration denominates the action as trespass on the case; and I conclude to regard the statement of the contract of conveyance as a passenger as matter of inducement explanatory of the reason of the plaintiff's presence on the car, and the ejection of the plaintiff from the car with force and arms as the *gravamen* of the action, and shall treat the action as trespass on the case. This classification of the action is necessary in passing on the motion to exclude the plaintiff's evidence; for, if we regard the declaration as in *assumpsit*, the evidence would go to sustain the action, and the motion to exclude it would consequently be overruled, but, if we regard it as in case, the evidence is not sufficient to sustain the action, and the motion to exclude it should have been sustained.

The plaintiff's evidence shows that he purchased from the defendant's agent at Ravenswood what was regarded a round-trip ticket from Ravenswood to Wheeling and return, and paid $7.35 for it, and under it went to Wheeling, and, when he started to return to Ravenswood, found that his ticket was stamped on each end from "Ravenswood to Wheeling" instead of being stamped, as it should have been, on one end for passage from Ravenswood to Wheeling, and on the other from Wheeling to Ravenswood; that he did not notice the mistake when he purchased the ticket, and first noticed it when he boarded the train at Wheeling to return to Ravenswood. The conductor on the train to Wheeling tore off one end or coupon of the ticket, and when, on his return, the plaintiff presented his ticket to the conductor, he refused to receive it because it called for a passage from Ravenswood to Wheeling, not from Wheeling to Ravenswood, and said to plaintiff: "This ticket is no good. You will have to pay your fare, or get off,"—and the plaintiff replied, "I'll be damned if I do." The conductor pulled the bell-rope to stop the train; and, as the train was stopping, plaintiff asked the conductor what was the matter with the ticket, and he said it was not good. The plaintiff informed him that he had come up on it the day before with Conductor Patrick; and the conductor, Rice, then said, "He gave you the wrong end," and said, further, "You will have to pay your fare." Plaintiff then said to him that he had no money, and that, if the conductor had given him the wrong end of the ticket, it was a mistake, and it did not cost any more to take him back than to bring him up, to which Conductor Rice replied, "It don't make a damn bit of difference," and that plaintiff must pay fare or get off. When the train stopped, the plaintiff said: "If I get off here, somebody will have to pay for it. I want to get home on this train." Plaintiff says he then got off the train down upon the street in the city of Wheeling. He further says: "Of course the passengers could not hear what was said between the conductor and myself, and they did not know what I was put off for."

There is no act of trespass shown by this evidence. There is not the slightest evidence of force or violence used by any of the defendant's employes upon the plaintiff. He was not, as alleged in the declaration, violently and with great force ejected and pushed and hurled from the car, but walked from it himself, without the slightest battery or assault upon his person. He does not himself say so, and other evidences make it quite clear that no force or violence was used. The evidence does show a breach of the company's contract to convey the plaintiff as a passenger, or an agreement to sell a different ticket, but not a trespass for which an action based on a tort can be maintained. It is simply the case of a refusal and failure to carry out its contract of conveyance, for which an action of trespass on the case, in *assumpsit* based on that contract, might be maintained. The mere manner of his expulsion would not sustain the action as one based on tort. The plaintiff's evidence is that the conductor "talked short" to him, and he to the conductor, and, when he was presenting his views as to the validity of the ticket, the conductor said, "It don't make a damn bit of difference,"—that he had to get off or pay fare.

In the late case in the supreme court of North Carolina, (Rose v. Railroad Co., 11 S. E. Rep. 526,) an action for putting plaintiff and her husband off a train, it appeared that, their ticket not being stamped as required, the conductor told the husband they must pay fare or get off, and afterwards, at the next station, said, in a brusque, decided manner: "This is H., if you are going to get off," and, they saying they had no intention of getting off unless ordered, he said, "Then I order you off," and they got off, and returned and paid fare, and it was held that the company was not liable for damages, though plaintiff was lying on pillows, and apparently an invalid. But, had force been used, if no more than was necessary to remove the plaintiff from the car, or if it be said that actual force is not necessary to sustain the action, but that threatened expulsion and departure of the passenger from the car by reason of it shall stand in lieu of it, I do not think the action can be maintained.

In Frederick v. Railroad Co., 37 Mich. 342, it is said that the uniform and universal practice is for railroad companies to issue tickets with the places designated from and to which the passenger is to be carried, and that these tickets are unhesitatingly accepted by the conductor as evidence of the contract between the company and passenger, and that the conductor has seldom any other means of ascertaining or learning, within time to be of any avail, the terms of the contract, unless he relies on the statement of the passenger, contradicted, perhaps, by the ticket, and that there will be cases where a ticket is lost, or where by mistake the wrong ticket was delivered to the passenger, and he will be obliged to pay his fare a second time to pursue his journey, and, if he is unable to do so, great delay and injury may result. Such delay and injury would be the natural result of the loss of the ticket or breach of the contract, but would, in part, at least, be in consequence of the pecuniary circumstances of the party. That such cases are exceptional, and however unfortunate the party who is so situated, yet no rule has ever been devised that would not at times injuriously affect those it was designed to accommodate. The judge then asks: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically, there are but two ways,—one, the evidence afforded by the ticket; the other, the statement of the passenger, contradicted by the ticket. Which should govern? * * * There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the right of the latter to travel, the ticket produced must be conclusive evidence; and he must produce it, when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract; but he would have to adopt a declaration differing essentially from the one resorted to in this case." In that case the passenger had paid to a point beyond that called for by the ticket, and, refusing to pay fare, was ejected, and was denied a recovery in an action on the case. The principle enunciated in this case in Michigan, that, as between the passenger and the conductor, the ticket is the conclusive evidence of the passenger's rights, is sustained in several well-considered cases. Townsend v. Railroad Co., 56 N. Y. 295; opinion by Chief Justice COOLEY in Hufford v. Railroad Co., 53 Mich. 118, 18 N. W. Rep. 580; Railroad Co. v. Griffin, 68 Ill. 499; McClure v. Railroad Co., 34 Md. 532; Shelton v. Railroad Co., 29 Ohio St. 214; Downs v. Railroad Co., 36 Conn. 287; Petrie v. Railroad Co., 42 N. J. Law, 449; Yorton v. Railroad Co., 54 Wis. 234, 11 N. W. Rep. 482; Bradshaw v. Railroad Co., 135 Mass. 407.

In the Ohio case of Shelton v. Railroad Co., supra, it was held that the fact that a ticket had been purchased, which was afterwards wrongfully taken up by a conductor on one train, will not relieve a passenger from the duty of buying a ticket or paying fare on another train of the defendant, and that in such case the right of action would be for wrongfully taking up the ticket, and not for removal from the train for failure to pay fare.

In the Illinois case above cited, (Railroad Co. v. Griffin,) it was held that if a passenger pay fare to a certain station, and the agent inadvertently give him a ticket to an intermediate station, the demand of a second fare will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying a second time, his action will be as complete as if he resist the demand, and suffers himself to be ejected; and his ejection will add nothing to his cause of action. It is his duty to pay the second fare; and, if the company fail to make reparation, he can maintain his appropriate action. This case recognizes the contract as the proper ground of action. Hall v. Railroad Co., 9 Fed. Rep. 585.

In Yorton v. Railroad Co., supra, the passenger, desiring to stop over, and having the right to a stop-over ticket, was given instead a trip check, through the conductor's fault; and it was held that a second conductor may demand additional fare, and may, on refusal to pay, eject him from the train, using no unnecessary force, and that such ejection will be no ground of recovery against the company, though it will be liable for the fault of the first conductor.

In Townsend v. Railroad Co., supra, it was held that a regulation of a railroad company requiring passengers to present evidence to the conductor of a right to a seat or pay fare, is reasonable, and for non-compliance a passenger may be put off, and the wrongful taking of the passenger's ticket by a conductor of a previous train, on which the passenger had performed part of his journey, does not exonerate him from compliance with the regulation, and that for the wrongful act of the former conductor the company is liable. It does not justify the passenger in violating the company's lawful regulation on another train.

In Hibbard v. Railroad Co., 15 N. Y. 455, it was held that a passenger who had a ticket in his pocket, and had exhibited it once to the conductor, and refused to exhibit it again when called on, was properly ejected for refusing to exhibit his ticket.

Here the plaintiff had a ticket not good for the trip he was making, and declined to pay fare. He cannot maintain an action for ejection, or a threatened ejection, from the train, but must look to the breach of contract, or the act of receiving money for the round trip and giving a wrong ticket. If the passenger have a ticket good for the passage, and the conductor should refuse to recognize it, and expel the passenger, the act would be a tort; and an action as for a tort could be maintained. Judge Cooley said in Hufford v. Railroad Co., supra, that all the judges of the Michigan supreme court agreed that if the ticket was apparently good the passenger need not leave the car. But here the ticket was very apparently not good. Therefore the motion of the defendant to reject plaintiff's evidence as not sustaining his action should have been sustained, not overruled. As the evidence should have been excluded, it becomes unnecessary to pass on the instructions. The judgment is reversed, the verdict of the jury set aside, and the case is remanded for a new trial in accordance with principles herein indicated.

SNYDER, P., and ENGLISH, J., concurred. LUCAS, J., dissenting.

ELLSWORTH v. CHICAGO, B. & Q. RY. CO.

(63 N. W. 584, 95 Iowa, 98.)

Supreme Court of Iowa. May 28, 1895.

Appeal from district court, Adams county; H. M. Towner, Judge.

On the morning of September 27, 1893, the plaintiff procured a ticket on defendant's line of road from Prescott to Corning, a distance of 7½ miles. Because of the fair at Corning, the company was selling round-trip tickets at reduced rates, which tickets had to be filled in with a pen. The plaintiff was late reaching the depot at Prescott, so that there was no time to fill up a round-trip ticket, and he told the agent to give him a "straight ticket." The train was moving, and plaintiff took the ticket handed him, and caught the train, and got onto the rear platform. Because of his haste, he did not pay for the ticket, but said to the agent that he would pay on his return, to which the agent assented. By a rule of the company, tickets must be used on the day they are purchased, and, if not so used, they may be returned, and the purchase money will be refunded. The ticket given plaintiff was dated September 24, 1893, instead of the 27th, the day on which it was handed to plaintiff. The delivery of the ticket to plaintiff was a mistake, it having before been sold, and not used, and then redeemed, as above stated. The redemption was by the night agent at Prescott, who put it in the drawer in the ticket office, and the day agent, without noticing the date, gave it to plaintiff. When a short distance from Prescott, the conductor asked for plaintiff's ticket, and the ticket in question was handed him, which, because of its date, he refused, and demanded the fare. The regular fare to Corning is 22 cents, and by the rules of the company, authorized by the laws of the state, 10 cents above the regular fare is collected by conductors when the ticket office has been open for a reasonable time before the departure of trains, and tickets are not secured. After the refusal of the conductor to receive the ticket, plaintiff offered to pay the regular fare, but refused to pay the additional 10 cents. The train was stopped, and plaintiff ejected, and this action is for damages. There was a verdict and judgment for the plaintiff, and the defendant appealed. Affirmed.

Smith McPherson, for appellant. Davis & Wells, for appellee.

GRANGER, J. 1. The court gave the jury the following instruction: "The ticket introduced in evidence, and which is admitted as the one purchased by plaintiff of defendant's agent, is dated September 24, 1893, and contains the following clause: 'Continuous passage within one day of date of sale.' You are instructed that said clause is a limitation of the time on which said ticket will be honored, and, as such, is a reasonable limitation and rule. You are further instructed that, presumptively, the date of the ticket was the day of its sale. But if, as a matter of fact, the day of the sale differs from the date of the ticket, yet the said ticket by its express terms was good from the date of sale, and you find from the evidence that said ticket was purchased by plaintiff on the 26th or 27th day of September, 1893, and was presented within one day from the actual date of such sale, it was good for such passage between the points named, to wit, Prescott and Corning." The instruction is said to involve error because it treats the transaction between the agent and plaintiff as a sale of the ticket, when it appears that the ticket was not paid for on delivery, but it was paid for afterwards on the same day On that branch of the case the court gave the following instruction: "In the case at bar it is admitted that plaintiff procured a ticket from the defendant's agent at Prescott before entering defendant's cars. It is also admitted that payment was not made until thereafter. On this branch of the case you are instructed that a neglect of plaintiff to pay for the same at that time, under the circumstances shown on the trial of this case, would not alone, or for that reason, invalidate the ticket; and an acceptance on the part of the agent of plaintiff's promise to pay therefor on his return, and a payment thereafter, constitute a valid consideration and payment therefor." It seems to us that that is the correct rule. Had there been a refusal to accept the ticket because not paid for, the question might be different. It is not what could be called a credit sale, nor was it intended as such, but only a delay in payment because there was not time to pay and get the train, and payment was expected the same day, and so made.

2. There is a further complaint of instruction No. 6 because, notwithstanding the clause, "continuous passage within one day of date of sale," it holds the ticket good if presented "within one day from the actual date of such sale." This contention means that the validity of the ticket for the passage depended upon its date rather than the fact as to the sale. We cannot concur in that view. It is not to be believed that the company ever intended to sell a ticket that should not be honored for a passage on the day of the actual sale. It is true that the intent is, in such cases, to have the two dates concur, but no company or person would ever design that its mistake in such a way should be to the prejudice of a purchaser of a ticket. It is not to be doubted that both the company and the plaintiff intended that the ticket in question should be good for a passage on the train on which it was offered. The facts admit of no other conclusion. It is equally true that the plaintiff was, as between himself and the com-

pany, entitled to passage on that train, and that his ejectment from it was wrongful. The more difficult question is as to his remedy for the wrong done him; that is, when the conductor refused to accept the ticket because of its date, had the plaintiff the legal right to insist on a passage on that train, and resist removal therefrom, or should he have paid his fare, as demanded, and sought redress from the company on that basis, or, not wishing to do that, should he, on request of the conductor, to avoid damage, have left the train without resistance, and based his damage on the mistake in selling him the ticket? Authorities on this question are far from being harmonious. Other courts have, and this court should, in determining these questions, keep in mind the difficulties to be met with and overcome in a successful management of the railway passenger traffic of the country, both as to the public and the carriers. To such an end it is clearly important that there shall be rules for the guidance of employés in the different parts of the service, and that such rules should be conclusive as to their course of conduct, even though at times the rule may operate to the prejudice of an individual passenger. We may instance a case or two as illustrative of it, as when a person who has purchased a ticket loses it. All will at once see that, although he has paid for the passage, he is not entitled to it on the lost ticket, because the only evidence to show the conductor that he has purchased a ticket is his word, and the confusion and consequences to result from such a system of management are too manifest to deserve comment. Take, also, a case in which a ticket is paid for, but no ticket handed to the passenger, through the neglect of the agent, and the passenger boards the train with no evidence of a right to a passage. The equitable status of the passenger in this case is somewhat stronger than in the other, but the importance of a rule of conduct for the conductor is equally strong. In such a case there is no harshness in the rule requiring him to seek his damage, if any, on the basis of a failure to deliver the ticket, and which excludes him from any rights on the train because of his payment for the ticket. It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor. This holding, at the outset, puts us to that extent in line with the authorities on the subject, a number of which are cited by appellant in support of its contention in this case. A case relied on by appellant is Frederick v. Railroad Co., 37 Mich. 342. We have examined the case with care. In that case it was claimed by plaintiff that he called and paid for a ticket from Ishpeming to Marquette, and, by mistake, the conductor gave him one to Morgan, an intermediate station. He rode to Morgan on the ticket, and, refusing to pay his fare to Marquette, he was ejected from the train, because of which he brought the action. In that case it will be seen that the passenger had no ticket from Morgan to Marquette, a fact known to him before reaching Morgan. The case in this respect is quite in line with the rule we announce, and, in this respect, unlike the case at bar. The opinion in that case deals somewhat elaborately with the importance of rules to guide conductors, and of the conclusiveness of the ticket as to his duty. In the opinion in that case it is said: "As between the conductor and passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train or collecting fares." With the proposition we do not differ, for, as between the conductor and passenger, no other rule can well obtain, but that is not to say that a passenger may not have rights on a train that a conductor, observing his instructions, may not violate so that the company will be liable. The reasoning in that case would carry the effect of the rule further than we indicate our approval. It treats of the duties of passengers, even when entitled to a passage on a ticket, and the right is denied by a conductor, and when a wrong ticket is issued by mistake of the agent, so that he has not the ticket he should have, and it favors a yielding on the part of the passenger to the claims of the conductor in either case, and his seeking a remedy otherwise than for an ejectment from the train. The force of that case as an authority in the respects stated is much lessened, if not entirely lost, from the fact that, of the four judges, two of them place their concurrence in an affirmance on a different ground, and it does not appear that the reasoning referred to is approved by them. In a later Michigan case, that of Hufford v. Railway Co., 53 Mich. 118, 18 N. W. 580, the language of the Frederick Case, that we approve, is in substance stated and approved. In the latter case the ticket purchased was a part of an excursion ticket that had, in part at least, been canceled, and this was apparent on the face of the ticket. The agent, when shown the ticket by the purchaser, said it was good, but it really was not. In that case, to prevent ejectment from the train, the passenger paid the fare, and the action was for damages because the conductor laid his hand on him to put him off, and took hold of the bell rope to stop the train for that purpose. It is not necessary for us to say whether or not we concur in the holding in that case, for we understand that court to rest its holding on the apparent invalidity of the ticket on its face, it having been canceled. It is said in that opinion: "But we are all of the opinion that, if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car." That is what we regard as the situation in this case. Plaintiff's ticket was apparently good on its face. It should have entitled him to one first-class passage from Prescott to Corning. The fact rendering it not good was a rule of the company as to the time in which it could be used. These rules are changeable at the pleasure of the company, and when a ticket is purchased from one station to another, and on its face it indicates a right to that passage, no rule or regulation of the company should be permitted to defeat that right. A passenger has a right to assume that an agent placed at a station will observe the rules with reference to such matters as dates in or on a ticket. What may be the rule to-day may not be to-morrow. Conceding plaintiff to have known of the rule previously, he was not called upon to question the act of the agent as to the rule on the day he bought the ticket. It is neither reasonable nor practicable for passengers to take notice of such matters, or attempt to correct agents in regard to them. With a ticket that expressed his right to a passage to Corning, he was not required to look behind it for the authority of the agent to issue it. We do not understand that the supreme court of Michigan would apply the rule as to yielding to the directions of a conductor to a case like this, where the ticket is apparently good, but, even if otherwise, we cannot so hold. It would be doing too much in favor of a party in the wrong merely to subserve a public convenience, for which much is claimed. A thought in argument is, and some language of the opinions referred to seems to favor it, that it is the duty of the passenger to not enhance damages by resistance, because it is of no use, but that he should submit quietly to ejectment, and then seek his damages. To say the least, we think he may make any resistance, not amounting to a criminal disturbance of the peace, as was done in this case, and that he is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered. Townsend v. Railway Co., 56 N. Y. 295, is another case cited and relied upon by appellant. In that case the passenger had surrendered his ticket to a conductor on another train. He changed trains, as was necessary, to reach his destination, but he had no evidence whatever of a right to a passage on that train. He claimed to the conductor that he had purchased a through ticket, and that the other conductor had taken it, and not given it back. For a refusal to pay, he was ejected, and a recovery had in the lower court. The case was reversed on two grounds, the latter ground being the part of the opinion relied on by appellant. The rule of the case is that the remedy was an action for the wrongful act of the first conductor in taking his ticket; that the act of the first conductor did not justify the violation of the lawful regulations of another train; that he should have left the train without resistance, and if he invited force, by resistance, the company was not liable for it. The rule is not against our conclusions. The conductor was right in refusing the passage without a ticket. In such a case the passenger must pay or leave the train. If he does not he is in the wrong. But even in that case two of the judges based their concurrence on the first ground, and one on the last.

The case of Hufford v. Railway Co., cited above, was appealed a second time and is reported in 64 Mich. 631, 31 N. W. 544. It will be remembered that it is the case where the canceled ticket was sold and refused by the conductor. As bearing upon the effect of such a ticket when presented this language is used: "The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of the plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say that the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the actions of its agents and the management of its affairs." The case holds that even the canceled ticket, because issued for a passage, was good and conclusive. Railway Co. v. Dougherty, 86 Ga. 744, 12 S. E. 747, was an action by a colored woman for being ejected from a train, where there was a mistake, her ticket being to Asheville, N. C., instead of Atlanta, Ga., as she supposed. In the opinion it is said: "We think she had a right to rely on the ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and, nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same, such conduct upon the part of the railroad company and its agents authorized her to recover damages." See Railroad Co. v. Olds, 77 Ga. 673; Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356; Railway Co. v. Fix, 88 Ind. 381; Railway Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Railroad Co. v. Rice, 64 Md. 63, 21 Atl. 97; Murdock v. Railroad Co., 137 Mass. 293; Burnham v. Railway Co., 63 Me. 298.

Some importance is attached to the fact that the plaintiff acquiesced in the demand of the conductor by offering to pay the regular fare, and only objected to the extra 10 cents, but we do not see how that makes a difference as to his right of recovery. It is not to be questioned but that he claimed his right to a passage on the ticket, and made the offer to avoid ejectment from the train. As he had a ticket, he felt that he should not be called upon to pay a penalty for a neglect of which he was not guilty. We cannot see how an offer to pay that was not accepted could excuse his ejectment from a train on which he was entitled to be.

The court authorized the jury to find exemplary damages, if it found that the act of defendant was malicious. Complaint is made of the instruction under the evidence, but it was warranted. There was evidence of the previous bad feeling and threats which, with what was done at the time of the ejectment, made the question one for the jury. The judgment is affirmed.

PRIMROSE v. WESTERN UNION TEL. CO.

(14 Sup. Ct. 1098, 154 U. S. 1.)

May 26, 1894.

No. 59.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action on the case, brought January 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message from the plaintiff, at Philadelphia, to his agent at Waukeney, in the state of Kansas.

The defendant pleaded (1) not guilty; (2) that the message was an unrepeated message, and was also a cipher and obscure message, and therefore, by the contract between the parties under which the message was sent, the defendant was not liable for the mistake. At the trial, the following facts were proved and admitted:

On June 16, 1887, the plaintiff wrote and delivered to the defendant, at Philadelphia, for transmission to his agent, William B. Toland, at Ellis, in the state of Kansas, a message upon one of the defendant's printed blanks, the words printed below in italics being the words written therein by the plaintiff, to wit:

"THE WESTERN UNION TELEGRAPH COMPANY.

"THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

"Receiver's No.	Time Filed	Check
	13	

"Send the following message, subject to the terms on back hereof, which are hereby agreed to. *June* 16, 1887.

"To *Wm. B. Toland, Ellis, Kansas.*

"*Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases.*

"*FRANK J. PRIMROSE.*

"☞ READ THE NOTICE AND AGREEMENT ON BACK OF THIS BLANK. ☜"

Upon the back of the message was the following printed matter:

"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz. one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

"NORVIN GREEN, President.

"THOS. T. ECKERT, General Manager."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form, the written words being printed below in italics:

"THE WESTERN UNION TELEGRAPH COMPANY.

"This company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

"Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of UNREPEATED MESSAGES beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

"THOS. T. ECKERT, General Manager.
NORVIN GREEN, President.

NUMBER	SENT BY	REC'D BY	CHECK.
Rt.	*S.*	*F. N.*	22 *Collect 3 extra words.*

"RECEIVED at 5 *K. p. m.* *June* 16, 1887.
"Dated *Philadelphia*, 16. *Forwarded from Ellis.*
"To *W. B. Toland, Waukeney, Kansas.*

"*Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.*

"*FRANK J. PRIMROSE.*"

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows:

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase.*"

The plaintiff testified that on June 16, 1887, he wrote the message in his own office on one of a bunch or book of the defendant's blanks which he kept at hand, and sent it to the defendant's office at Philadelphia; that he had a running account with the defendant's agent there, which he settled monthly, amounting to $180 for that month; that he did not then read, and did not remember that he had ever before read, the printed matter on the back of the blanks; and that he paid the usual rate of $1.15 for this message, and did not pay for a repetition or insurance of it.

He also testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado, with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12th, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know; that he had frequently sent messages for him, and considered him one of his best customers during the wool season; that telegraphic messages by the present system were sent and received by sound, and were all dots and dashes; that "b" was a dash and three dots, and "y" was two dots, a space, and then two dots; and that the difference between "a" and "u" was one dot, "a" being a dot and a dash, and "u" two dots and a dash, and the pause upon the last touch of the "u;" that an experienced telegraph operator, if the words were properly rapped out, and he was paying proper attention, could not well mistake the one for the other, but might be misled if he was not careful; and that it was very likely that another dot could be put in if there was any interruption in the wire. He further testified that there was a great difference between the words "despot" and "destroy" in telegraphic symbols; and that the letter "s" was made by three dots, so that, if an operator received the word "purchases" over the wires, and wrote down "purchase," he omitted three dots from the end of the word.

The plaintiff introduced depositions, taken in September, 1888, of one Stevens and one Smith, who were respectively telegraph operators of the defendant at Brookville and at Ellis, in the state of Kansas, on June 16, 1887.

Stevens testified that Brookville was a relay station of the company, at which messages from the east were repeated westward; that on that day one Tindall, his fellow operator in the Brookville office, handed him a copy in Tindall's handwriting of the message in question (an impression copy of which he identified and annexed to his deposition), containing the words "despot" and "bay," and he immediately transmitted it, word for word, to Ellis; that the equipment of the office at Brookville was in every respect good and sufficient; and that he had no recollection of the wires between it and Ellis having been in other than good condition on that day.

Smith testified that on that day he received the message at Ellis from Brookville, and immediately wrote it down, word for word, just as received (and identified and annexed to his deposition an impression copy of what he then wrote down), containing the words "destroy" and "buy," and transmitted it, exactly as he received it, to Waukeney, to which Toland had directed any messages for him to be forwarded; and that the office at Ellis was well and sufficiently equipped for its work, but he could not recall what was the condition of the wires between it and Brookville.

The plaintiff also introduced evidence tending to show that June 16, 1887, was a bright and beautiful day at Ellis and Waukeney; that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upwards of $20,000.

The circuit court, following White v. Telegraph Co., 5 McCrary, 103, 14 Fed. 710, and Jones v. Telegraph Co., 18 Fed. 717, ruled that there was no evidence of gross negligence on the part of the defendant; and that, as the message had not been repeated, the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of $1.15, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Geo. Junkin and Jos. de F. Junkin, for plaintiff in error. Silas W. Pettit, John H. Dillon, Geo. H. Fearons, and Rush Taggart, for defendant in error.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message, subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: "☞ Read the notice and agreement on back of this blank ☜."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; [2] nor for mistakes or delays in the transmission or delivery or for nondelivery of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; [3] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employe of the company is authorized to vary the foregoing." "[4] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first by which the company is not to be liable for mistakes in the transmission or delivery of any message beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways; and they are not subject to the same liabilities. Express Co. v. Caldwell, 21 Wall. 264, 269, 270; Telegraph Co. v. Texas, 105 U. S. 460, 464.

The rule of the common law by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods. The identity of the goods which he receives with those which he delivers can hardly be mistaken. Their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols, by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement. It is of no intrinsic value. Its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose. It may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in Express Co. v. Caldwell, above cited: "Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 442, 9 Sup. Ct. 469, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." Hart v. Railroad Co., 112 U. S. 331, 343, 5 Sup. Ct. 151.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise.

In Telegraph Co. v. Hall, 124 U. S. 444, 453, 8 Sup. Ct. 577, the effect of such a regulation was presented by the certificate of the circuit court, but was not passed upon by this court, because it was of opinion that, upon the facts of the case, the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in McAndrew v. Telegraph Co., 17 C. B. 3, and in Baxter v. Telegraph Co., 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American case, decided by the court of appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: "The public are admonished by the notice that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that, if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk, at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur." Camp v. Telegraph Co., 1 Metc. (Ky.) 164, 168.

In Telegraph Co. v. Carew, 15 Mich. 525, 535, 536, the supreme court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. "The regulation," said Chief Justice Christiancy, "of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message or any other circumstance which may affect the question." "The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing, and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In Birney v. Telegraph Co., 18 Md. 341, 358, the court of appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In Telegraph Co. v. Gildersleve, 29 Md. 232, 246, 248, the same court, speaking by

Mr. Justice Alvey (since chief justice of Maryland and of the court of appeals of the district of Columbia), said: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for the purpose." "The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct or gross negligence or any conduct inconsistent with good faith; nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of nondelivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message; and, having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company."

In Passmore v. Telegraph Co., 9 Phila. 90. 78 Pa. St. 238, at the trial in the district court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards, at Philadelphia, in these words: "I hold the Tibbs tract for you; all will be right,"—but which, as delivered by the company in Philadelphia, was altered by substituting the word "sold" for "hold;" and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message nor directed it to be repeated, and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with an opinion of Judge Hare, the most important parts of which were as follows:

"A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must however, be such as that reason, which is said to be the life of the law, can approve; or, at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for willful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule which, in marking out a path plain and easily accessible, as that in which the company guaranties that every one shall be secure, declares that, if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and, as such, upheld by the courts."

"The function of the telegraph differs from that of the post office in this: that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder storms and other natural causes. It is therefore obvious that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came."

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition." 9 Phila. 92–94; 78 Pa. St. 242–244.

The judgment was affirmed by the supreme court of Pennsylvania, for the reasons given by Judge Hare and above stated. 78 Pa. St. 246; Telegraph Co. v. Stevenson, 128 Pa. St. 442, 455, 18 Atl. 441.

In Breese v. Telegraph Co., 48 N. Y. 132, the plaintiffs' agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words, "Buy us seven ($700) hundred dollars in gold." In the statement of facts upon which the case was submitted, it was agreed that he had never read the printed part of the blank, and that "the message thus delivered was transmitted from the office at Palmyra as written; but, by some error of the defendant's operators working between Palmyra and New York," it was received in New York and delivered in this form, "Buy us seven thousand dollars in gold," and the brokers accordingly bought that amount for the plaintiffs, who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In Kiley v. Telegraph Co., 109 N. Y. 231, 235–237, 16 N. E. 75, a similar decision was made, the court saying: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable." "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that the failure was due to the willful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is therefore brought within the letter and purpose of the stipulation."

In the supreme judicial court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed. Ellis v. Telegraph Co., 13 Allen, 226; Redpath v. Telegraph Co., 112 Mass. 71; Grinnell v. Telegraph Co., 113 Mass. 299; Clement v. Telegraph Co., 137 Mass. 463.

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought, not by the sender, but by the receiver, of the message, who had no notice of the printed conditions until after he received it, and could not therefore have agreed to them in advance. Such were Telegraph Co. v. Dryburg, 35 Pa. St. 298; Harris v. Telegraph Co., 9 Phila. 88; and De la Grange v. Telegraph Co., 25 La. Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect, all liability beyond the price paid was avoided. True v. Telegraph Co., 60 Me. 9, 18; Bartlett v. Telegraph Co., 62 Me. 209, 215; Candee v. Telegraph Co., 34 Wis. 471, 476; Hibbard v. Telegraph Co., 33 Wis. 558, 564. In Bartlett's Case the court said: "Most, if not all, the cases upon this subject, refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that, owing to the liability to error from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated, the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message is presumed to be the best judge of its importance, he must, on his own responsibility, make his election whether to have it repeated." 62 Me. 216, 217.

The passage cited from the opinion of the circuit court of appeals in Delaware & A. Telegraph & Telephone Co. v. State, 3 U. S. App. 30, 105, 2 C. C. A. 1, and 50 Fed. 677, in which the same judge who had decided the present case in the circuit court said, "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment," had regard, as is evident from the context, and from the reference to Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In Rittenhouse v. Independent Line, etc, 1 Daly, 474, 44 N. Y. 263, and in Turner v. Telegraph Co., 41 Iowa, 458, it does not appear that the company had undertaken to restrict its liability by express stipulation.

The Indiana decisions cited appear to have been controlled by a statute of the state enacting that telegraph companies should "be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering despatches." Telegraph Co. v. Meek, 49 Ind. 53; Telegraph Co. v. Fenton, 52 Ind. 1.

The only cases cited by the plaintiff in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be Tyler v. Telegraph Co., 60 Ill. 421, 74 Ill. 168; Ayer v. Telegraph Co., 79 Me. 493, 10 Atl. 495; Telegraph Co. v. Griswold, 37 Ohio St. 301; Telegraph Co. v. Crall, 38 Kan. 679, 17 Pac. 309; Telegraph Co. v. Howell, 38 Kan. 685, 17 Pac. 313; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in Dorgan v. Telegraph Co., 1 Am. Law T. (N. S.) 406, Fed. Cas. No. 4,004, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in Tyler v. Telegraph Co., above cited.

In that case the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker: "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1,000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The supreme court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Ill. 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances;" and "whether he had knowledge of its terms, and consented to its restrictions, is for the jury to determine as a question of fact, upon evidence aliunde." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Ill. 431–433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not, or else to allow to the stipulation no effect whatever; for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision, was restated by the court when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and, when the charges were paid, the duty of the company began, and there was therefore no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent. of the original charges." 74 Ill. 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever; whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss by contract, and that such a regulation as the one under which appellees defended is a reasonable regulation, and amounts to a contract." And, again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Ill. 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back, he did not venture to say that he had not read it; still less that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16th, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15th, there was substituted a word signifying that his message of June 17th had been received (which was evidently impossible), could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting, for the last word "purchase," in the singular, the word "purchases," in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the state of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), prove that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form, and that, as written down by the operator at Ellis, it was in its altered form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth; nor is there anything in the case tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing or in transmitting it to Ellis, or else in a mistake of the operator at Ellis in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible that, if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in Hart v. Railroad Co., already cited, in which five horses were delivered by the plaintiff to a railroad company for transportation under a bill of lading, signed by him and by its agent, which stated that the horses were to be transported upon the terms and conditions thereof, "admitted and accepted by" the plaintiff "as just and reasonable," and that freight was to be paid at a rate specified, on condition that the carrier assumed a liability not exceeding $200 on each horse; and the circuit court, and this court on writ of error, held that the contract between the parties could not be controlled by evidence that one of the horses was killed by the negligence of the railroad company, and was a race horse, worth $15,000. 2 McCrary, 333, 7 Fed. 630; 112 U. S. 331, 5 Sup. Ct. 151.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employe of the company is authorized to vary the foregoing," which evidently includes this as well as other restrictions.

It is difficult to see anything unreasonable or against public policy in a stipulation that if the handwriting of a message delivered to the company for transmission is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message, and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employe of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577.

In Hadley v. Baxendale (decided in 1854) 9 Exch. 345, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in Telegraph Co. v. Hall, above cited, and in Howard v. Manufacturing Co., 139 U. S. 199, 206, 207, 11 Sup. Ct. 500; Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

In Sanders v. Stuart, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case, we think that the rule in Hadley v. Baxendale applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion, how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what nor whether any damage would follow from the breach of it. And for the same reason, viz. the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and indeed intentionally procured by, the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally—i. e. according to the usual course of things—from the breach' of such a contract as this." 1 C. P. Div. 326, 328, 45 Law J. C. P. 682, 684.

In Telegraph Co. v. Gildersleve, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the court of appeals of Maryland, and applying the rule of Hadley v. Baxendale, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated; and, if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251.

In Baldwin v. Telegraph Co., which was an action by the senders against the telegraph company for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the court of appeals of New York, said: "The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a nondelivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance." "The dispatch not indicating any purpose other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an undervalue, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would naturally and necessarily result from the failure to deliver the message would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See, also, Hart v. Cable Co., 86 N. Y. 633.

The supreme court of Illinois, in Tyler v. Telegraph Co., above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434. And in the recent case of Cable Co. v. Lathrop the same court said: "It is clear enough that, applying the rule in Hadley v. Baxendale, supra, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying that it can contain no information of value as pertaining to a business transaction, and a failure to send it or a mistake in its transmission can reasonably result in no pecuniary loss." 131 Ill. 575, 585, 23 N. E. 583.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. Candee v. Telegraph Co., 34 Wis. 471, 479–481; Beaupre v. Telegraph Co., 21 Minn. 155; Mackay v. Telegraph Co., 16 Nev. 222; Daniel v. Telegraph Co., 61 Tex. 452; Cannon v. Telegraph Co., 100 N. C. 300, 6 S. E. 731; Telegraph Co. v. Wilson, 32 Fla. 527, 14 South. 1; Behm v. Telegraph Co., 8 Biss. 131, Fed. Cas. No. 1,234; Telegraph Co. v. Martin, 9 Ill. App. 587; Abeles v. Telegraph Co., 37 Mo. App. 554; Kinghorne v. Telegraph Co., 18 U. C. Q. B. 60, 69.

In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the circuit court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. Judgment affirmed.

Mr. Chief Justice FULLER and Mr. Justice HARLAN dissented.

Mr. Justice WHITE, not having been a member of the court when this case was argued, took no part in its decision.

WESTERN UNION TEL. CO. v. WILSON.

(14 South. 1, 32 Fla. 527.)

Supreme Court of Florida. Nov. 8, 1893.

Appeal from circuit court, Escambia county; James F. McClellan, Judge.

Action by Charles M. Wilson against the Western Union Telegraph Company for a failure to transmit and deliver a message. Plaintiff had judgment, and defendant appeals. Reversed.

Mallory & Maxwell, for appellant. John C. Avery, for appellee.

TAYLOR, J. The appellee sued the appellant in the circuit court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in cipher. The suit resulted in a judgment for the plaintiff in the sum of $688.88, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the 12th day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Fla., and New York, in the state of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant broker or agent, to wit, one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit and cause to be transmitted, and it was its duty to transmit and cause to be transmitted, to the said A. Dobell, the following cipher message: 'Dobell, Liverpool: Gladfulness—shipment—rosa — bonheur — luciform — banewort — margin,'—which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of twelve hundred dollars, but the defendant failed and neglected to send the said message, in violation of its duty to the plaintiff, and to the plaintiff's loss of $1,200," and therefore he sues, etc.

At the trial the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was 52 shillings a load, and which amounted to $630.84 less than the price at which he offered same for sale in the message failed to be sent. The overruled objection of the defendant to this testimony was that the damage sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public, for hire, as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. Telegraph Co. v. Hyer, 22 Fla. 637, 1 South. 129. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the cause celebre of Hadley v. Baxendale, 9 Exch. 341: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it,"—hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone,—a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that, if its importance had been disclosed to the operator, that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which, in consideration thereof, he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him." The answer to all this is that the same argument is equally applicable as a reason why the rule in Hadley v. Baxendale should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals with the tangible. When he contracts, he has in his mind's eye, from the visible, tangible subject of his contract, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier. Therefore, the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because, in the eye of the law, the parties having mutually contemplated such damages in going into such contract, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in Hadley v. Baxendale is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves, in express terms, fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which, in the eye of the law, has been mutually agreed upon between the parties, but concerning which their contract itself is silent. This essential leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in Telegraph Co. v. Hyer, supra, i. e. that the damages provided for under the rule arise ex contractu, and that, unless there is mutuality in all the essential elements that enter into or grow out of the contract, the whole fabric becomes unilateral, and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, uncontemplated, nonconsented-to damages, seems to us to be a complete upheaval of all the old landmarks in reference to damages upon broken contracts, and the establishment of a new rule, that is neither fair, just, or equitable, and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in Telegraph Co. v. Hyer, supra, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty, if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach has nothing to do with the subject whatever. But we are to look to and consider the mutual rights of the parties from the inception of the contractual relations between them, down through the contract itself, to the breach complained of. One of the primary rights that each party has, who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct, probable results will reasonably, and in the usual course of events, follow bad faith, neglect, or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as to guard against and avoid, for his own benefit, the foreseen, calamitous consequence, or that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in Hadley v. Baxendale, supra, is the one properly applicable to the contracts of telegraph companies for the transmission of messages has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577; Sanders v. Stuart, 1 C. P. Div. 326; Behm v. Telegraph Co., 8 Biss. 131;[1] White v. Telegraph Co., 14 Fed. 710; Baldwin v. Telegraph Co., 45 N. Y. 744; Telegraph Co. v. Graham, 1 Colo. 230; First Nat. Bank v. W. U. Tel. Co., 30 Ohio St. 555; Candee v. Telegraph Co., 34 Wis. 471; Daniel v. Telegraph Co., 61 Tex. 452; Beaupre v. Telegraph Co., 21 Minn. 155; True v. Telegraph Co., 60 Me. 9; Squire v. Telegraph Co., 98 Mass. 232; Telegraph Co. v. Wenger, 55 Pa. St. 262; Tyler v. Telegraph Co., 60 Ill. 421; Telegraph Co. v. Gildersleve, 29 Md. 232; Telegraph Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70; Cannon v. Telegraph Co., 100 N. C. 300, 6 S. E. 731; Landsberger v. Telegraph Co., 32 Barb. 530; Manville v. Telegraph Co., 37 Iowa, 214; Telegraph Co. v. Edsall, 63 Tex. 668; Hibbard v. Telegraph Co., 33 Wis. 558; Thompson v. Telegraph Co., 64 Wis. 531, 25 N. W. 789; Abeles v. Telegraph Co., 37 Mo. App. 554; Telegraph Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; 3 Suth. Dam. 298; Wood, Mayne, Dam. 40; Thomp. Elect. §§ 311–316, inclusive; Id. §§ 346, 358–375, inclusive. Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: Telegraph Co. v. Hyer, supra; Daughtery v. Telegraph Co., 75 Ala. 168; Id., 89 Ala. 191, 7 South. 660; Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844; Telegraph Co. v. Fatman, 73 Ga. 285; Alexander v. Telegraph Co., 66 Miss. 161, 5 South. 397. The case of Telegraph Co. v. Reynolds, 77 Va. 173, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached are predicated upon a statutory provision in their Code. In the case at bar, the message that it is alleged the defendant company failed to send was in cipher, and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist, Rosa Bonheur, named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness," in the message, had a special meaning. What that special meaning was, he did not disclose. Under these circumstances, all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

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[1] Fed. Cas. No. 1,234.

There is another feature presented in the proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent, Dobell, in Europe, an offer for the cargo of timber. What that offer was, is nowhere stated or shown. Then he says: "I decided to make a final proposition, which I did by taking the message to the telegraph office, that was not sent, which message, when translated, was an offer by me of said cargo of timber for sale at 54 shillings per load." Then he says that he missed the sale of the cargo at the terms offered by him in his message in consequence of the defendant's failure to send it, and consequently had to sell on the market for the best price he could get, which was 52 shillings per load. There is not a word of proof in the record to show that his offer contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the price at which he so offered it, or that it could ever have been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet, in the face of this state of the proofs, damages have been allowed to the plaintiff equal to the difference between a price at which he simply offered his timber for sale, and the price actually received by him for it, without a word of proof to show whether the higher price at which he offered it for sale could ever have been obtained for it or not.

The appellee contends that because of the decision in Telegraph Co. v. Hyer, supra, the question of damages cannot be considered; that, as to this case, it is stare decisis. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in the Hyer Case, we do not interfere with any vested right acquired upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule as laid down in that case, we are perfectly and clearly satisfied; and in such case, in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmance of what we deem to be the erroneous rule in that case will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn it, and such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we cannot see why, if the protection of the rule in Hadley v. Baxendale is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man, would be such an uprooting of the old landmarks as to make it impracticable to surmise the harmful results that would follow.

Entertaining these views, we do not think that the doctrine of stare decisis constrains us to adhere to the rule in the Hyer Case, but think that less harm will follow our return to the well-beaten and familiar track that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

RANEY, C. J., (concurring.) A reconsideration of the question of the measure of damages involved here confirms the correctness of the view expressed in my dissenting opinion in Telegraph Co. v. Hyer, 22 Fla. 649 et seq., 1 South. 129, and I concur in the opinion of Judge Taylor, that the rule followed in the case mentioned is unfair, and ought not to be perpetuated; and, without committing myself further upon the question of stare decisis, my conclusion is that more injury will result in the future from adhering to the rule of the Hyer Case than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. Cooley, Const. Lim. (5th Ed.) 65, and note 1; Wells, Stare Dec. § 624 et seq.; Chamberlain, Stare Dec. 19.

MABRY, J., (dissenting.) The question of liability to damage for a failure on the part of a telegraph company to send a cipher message is not a new one in this court. Over six years ago this question was deliberately settled here by the decision in the case of Telegraph Co. v. Hyer, 22 Fla. 652, 1 South. 129. It is proposed now to reverse this case, and my view is that it should not be done. Every question in reference to cipher messages entering into the case now before us was fully discussed and maturely considered in the Hyer Case, and this case has the support of decisions in Alabama, Mississippi, Georgia, and Virginia. Under the decision in the Hyer Case, there was a remedy for damages for a failure on the part of a telegraph company to send a cipher message, when it had, for compensation, agreed to do so. There is much merit in the rule that, where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages resulting from its own violation of duty on the ground that the message was in cipher, and its contents not known to the company when it agreed to send it. This court having planted itself in favor of this rule over six years ago, I do not think we should now disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.

FIRST NAT. BANK OF BARNESVILLE v. WESTERN UNION TEL. CO.

(30 Ohio St. 555.)

Supreme Court of Ohio. Dec. Term, 1876.

Error to district court, Belmont county.

J. H. Collins, for plaintiff in error. J. W. Okey and O. J. Swaney, for defendant in error.

WRIGHT, J. The First National Bank of Barnesville brought an action in the court below, against the telegraph company, to recover damages for failure to transmit and deliver a telegraphic message. The bank was located in Barnesville, Ohio. It had done business with one Aaron Lowshe, and had frequently cashed drafts for him, in a small way, prior to February, 1869. In that month, Lowshe wanted two more drafts cashed—one on Bellis & Milligan, New York, for $1,600; one on Ege & Otis, same place, for $1,400. The amounts being large, and the bank cautious, the cashier wrote to a correspondent in New York, George F. Baker, cashier First National Bank, New York, as follows: "Would like information in respect to Mess. Ege & Otis, No. 168 W. W. Market; also, Mess. West, Titus & Co., No. 129 West street. Are they responsible parties? If not too much trouble, would be pleased to have you inquire of each, if dft., at sight, drawn by A. Lowshe for $1,400 to $1,600, would be paid. If the firms or either of them, are not reliable for that amt., or if they should be unwilling to accept, please answer by telegram. If all right, need not dispatch. If not right, would like to hear by Saturday evening. (13th)."

This letter was dated at Barnesville, February 11th, which appears to have been Thursday. No mention is made, it will be observed, of Bellis & Milligan, on whom the $1,600 draft was drawn.

The letter was received in New York by Baker, to whom it was addressed, on February 15th. It is stated in evidence that the ordinary time of mail communication, between Barnesville and New York, is two days. This advice to Baker probably reached its destination after close of bank hours, on Saturday, and was taken up in the ordinary course of business on Monday morning. On that day Baker made inquiries of Ege & Otis, on whom the $1,400 draft was drawn, and at 4:55 of that day telegraphed as follows, to the Bank at Barnesville: "February 15, 1869. To J. F. Davis, Cash., Barnesville, O. Parties will accept if bill lading accompanies the draft. Parties stand fair. Geo. F. Baker, C."

This message never was received at Barnesville. There is testimony tending to show that it started to and perhaps reached Buffalo. But it is not traced beyond that point, and the telegraph company give no satisfactory account of what became of it. The one certain fact about it is, that the Barnesville bank never received it. New York not being heard from, the Barnesville bank cashed the drafts, on Monday the 15th, before three o'clock, the hour at which business closed. Lowshe, the drawer, had no money in New York at all, either in the hands of Bellis & Milligan, or Ege & Otis, and having accomplished his financial transaction at Barnesville, left the same day for Zanesville, and from thence to other places more remote. The Barnesville bank now claims that the $3,000 was a total loss; and that this loss is chargeable upon the telegraph company, in not sending and delivering the dispatch. They therefore claim to recover this amount in this action.

In the first petition of the bank, it is stated that the drafts were discounted between two and three o'clock on the 15th, which would not have been done had the dispatch been reasonably delivered. The answer of defendant, however, showed that the dispatch was not delivered in New York until 4:55; it is therefore entirely obvious, that no omission or neglect on the part of the telegraph company could have prevented the cashing of the drafts.

In the last petition of the bank, it is said: "The said drafts were a total loss to said plaintiff, no part thereof having been paid, which said loss would have been prevented if said defendant had forwarded and delivered said dispatch to said plaintiff within a reasonable time after it was received by said defendant at its said office in New York city, as aforesaid. If said dispatch had been delivered to said plaintiff before said drafts were discounted, the same would not have been discounted; and if it had been delivered to said plaintiff within a reasonable time after the same was discounted, the said sum of $3,000 could have been recovered back by said plaintiff from said Lowshe."

In the view we take of the case, the sole question that need be decided is the one of damages. As has been said, had the dispatch been duly sent and received, it could not have prevented the bank from giving Lowshe the money; that had already been done. Had it been delivered, however, within any reasonable time, after receipt at New York, then what would have happened? Plaintiffs below say they could have recovered back the amount from Lowshe, and therefore they lost their $3,000 by the negligence of the defendant. The petition does not state how or in what manner they could have recovered the money, but merely asserts the fact to be so. The only facts in evidence showing any intention to take steps to recover the money, or intimating how it was to be done, is the following from the cashier, Davis: "Q. Would there have been any trouble in the bank giving security in Zanesville in any proceeding to recover the money? (Objected to.) A. I think not. Q. State whether, if this message had been received by the bank during the afternoon or evening of February 16, 1869, any means would have been used to recover the money; if so, what? A. I am confident means would have been used to recover it."

Mr. Lowshe also makes this statement: "Q. If the bank had discovered, while you were at Barnesville or Zanesville, that those drafts which you had cashed at the Barnesville bank would not be accepted, and had demanded the money back, would you have refunded it to the bank? A. At Zanesville, on the afternoon of the first day there, I sent five hundred dollars of the money home. Had the bank informed me at Barnesville the drafts would not be accepted, I would have returned the money to the bank. Had such information reached me at Zanesville, before I sent the five hundred dollars home, I would have returned it all. Had such information reached me at Zanesville after I sent the five hundred dollars home, I would have returned the balance to the bank. I would have returned the money immediately on receiving such information."

In this connection the court charged the jury in effect, that if defendants were guilty of negligence in not transmitting the message, then plaintiffs must show that Lowshe was where they could have reached him with legal process and that he had property in such position that the law could lay hold of it; and if this was not shown, but it appeared that the recovery of the money depended upon the happening of a new contingency which might or might not have occurred, the damages were so remote that no recovery could be had.

Upon the case as thus made, we are clearly of opinion that the plaintiff was not entitled to substantial damages. If the New York dispatch had arrived upon the 15th or 16th, it is not made apparent, either in pleadings or proof, how the bank was to secure itself, with that certainty the law requires, in order to justify a claim for damages. It is not made to appear that Lowshe had property that could be seized. He had obtained this money, it is true, and perhaps might have had it in his possession, but he might easily have put it beyond the reach of process. But even if he had the money where he could lay his hand upon it, it is not pointed out how the bank proposed to reach it. Had he been arrested on the ground of fraud, it might have been difficult to sustain such a proceeding, until after the drafts had been actually protested for nonacceptance, by which time Lowshe was lost sight of. Nor is it alleged or proved that an actual arrest would have produced the money. It is true, the bank claims that Mr. Lowshe would have returned the money, because he said he would; still the jury might have considered that as the "mere contingency," which, the court instructed them, only occasioned a damage that was remote.

The rule as to damages is thus laid down by Earl, J., in Leonard v. Telegraph Co., 41 N. Y. 544: "The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this rule, speculative, contingent, remote damages which can not be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be fairly supposed to have contemplated when they made the contract. A more precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." See, also, Kinghorne v. Telegraph Co., 18 U. C. Q. B. 60, and Stevenson v. Telegraph Co., 16 Id. 530; Squire v. Telegraph Co., 98 Mass. 232.

This is substantially the rule as laid down in Hadley v. Baxendale, 9 Exch. 341, and in considering what damages may be supposed to have been fairly within the contemplation of the parties, there was nothing in this dispatch to inform the telegraph company of the serious consequences that are now presented. There was absolutely nothing in the language of the message advising the company that it was to prevent the cashing of $3,000 worth of drafts. Hadley v. Baxendale, and numerous authorities, hold that, before a party can be charged with such special and peculiar damages as are here claimed, he must have had notice that they were likely to arise from a breach of his contract.

In Parks v. Telegraph Co., 13 Cal. 422, the message was to attach property. This was of itself notice that if the attachment was not procured, the loss of the debt might follow.

Bryant v. Telegraph Co., 1 Daly, 575, was, like the last, a case where an attachment was directed.

In Telegraph Co. v. Wenger, 55 Pa. St. 262; Allen, Tel. Cas. 356, there was an order to buy stocks, which was delayed. The stocks rose in value, and the telegraph company were held responsible for the difference. And it is said by the court that the despatch was such as to disclose the nature of the business to which it related, and the loss might be very likely to occur if there was delay in sending the message.

Upon the other hand, in Baldwin v. Telegraph Co., 54 Barb. 505, 1 Lans. 125, 45 N. Y. 744, the syllabus is: "If a telegram does not show upon its face that it relates to a business transaction, and that a pecuniary loss may probably be sustained if a mistake is made in transmitting it, and no notice to this effect is given to the telegraph company, the company making such mistake will not be liable in damage for such loss."

In Landsberger v. Telegraph Co., 32 Barb. 536, it was held that plaintiff could not recover damages, because, "on receiving the despatch from transmission, the defendant had no information whatever in relation to it, or the purposes to be accomplished by it, except what could be derived from the dispatch itself."

In Telegraph Co. v. Gildersleve, 29 Md. 232, Allen, Tel. Cas. 390, it is held that knowledge of special circumstances must be shown, to lay a foundation for special damages. Stevenson v. Telegraph Co., 16 U. C. Q. B. 530, 537. The telegraph cases, generally, follow the rule of Hadley v. Baxendale, with regard to notice, as is shown by the numerous authorities cited by counsel.

It therefore appears to us that the possibility of recovering the money from Lowshe was a contingency too remote upon which to base a recovery. The fact that the company were not advised of any importance attaching to the message, either by the message itself or actual notice given, goes further to show a case where substantial damages cannot be recovered.

And in this connection, and as relating to the question of damages, we may consider the rule, "causa proxima non remota spectatur," as to which Parsons says (volume 2, p. 257, "Telegraphs, Measure of Damages"): "If the telegraph company is in default, but their default is made mischievous to a party only by the operation of some other intervening cause, then the rule above mentioned would prevent the liability of the company; because their default would only be the remota, the remote or removed cause of the injury, and not the proxima, or nearest cause."

If the telegraph company were guilty of negligence in not delivering the message at Barnesville, the question remains, whether there would have been a loss if there were no other cause intervening. Clearly the failure in the message was not the moving cause that induced Lowshe to obtain the discounts and pocket the money; neither would the delinquency of the telegraph company have occasioned any damage had Lowshe evidenced that integrity which, in a virtuous mind, would have induced the return of the money to the bank. The loss was occasioned by two causes,—the short-coming of the telegraph company, in not delivering the message, and the still shorter-coming of Lowshe, in appropriating to himself what belonged to somebody else.

In Lowery v. Telegraph Co., 60 N. Y. 198, B. sent a telegram to plaintiff, asking for $500; by mistake, the telegraph company changed the message to $5,000, which B. obtained, embezzled, and absconded. The referee held the telegraph company liable for the loss in the whole amount. This was held error; that defendant's negligence was not the proximate cause of the loss, as the embezzlement of B. did not naturally result therefrom, and could not reasonably have been expected.

In this case, the court, quoting from Crain v. Petrie, 6 Hill, 522, lay down this rule: "To maintain an action for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third person induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of."

In any aspect, therefore, in which we are able to view the case, we cannot but consider that the damages are too remote to uphold recovery to any substantial amount.

But the plaintiff was entitled to recover nominal damages. Upon the breach of an agreement, the law infers damages, and, if none are proved, nominal can be recovered. Sedg. Meas. Dam. 47; Field, Dam. 679; Parks v. Telegraph Co., 13 Cal. 425; Candee v. Telegraph Co., 34 Wis. 471.

The plaintiff asked the court to charge that, if the nondelivery of the message was by reason of defendant's negligence, plaintiff was entitled to nominal damages, if there were no actual damage. This was refused, and the court did charge that there was no right of action, unless injury was shown. This was error, for which the judgment must be reversed.

The state of the pleadings relieves us from consideration of those points in the case which refer to the special contract which forms the heading to the message itself. This contract was set up as a defense in the answer to the original petition. Subsequently, however, an amended petition was filed. To this an answer was filed, not making the original answer a part thereof, and not setting up the special contract as a defense. In this state of the pleadings, we look to the amended petition and answer alone. Thus the special contract is eliminated from the case. Judgment reversed.

CONNELL v. WESTERN UNION TEL. CO.

(22 S. W. 345, 116 Mo. 34.)

Supreme Court of Missouri, Division No. 2. May 16, 1893.

Error to circuit court, Pettis county; Richard Field, Judge.

Action by Mathew Connell against the Western Union Telegraph Company for failure to promptly deliver a telegram. From an order of dismissal for want of jurisdiction, plaintiff appeals. Affirmed.

Wm. S. Shirk, for plaintiff in error. Karnes, Holmes & Krauthoff, Charles E. Yeater, and G. H. Fearons, for defendant in error.

GANTT, P. J. This is an action for damages for the negligence of defendant in failing to deliver to plaintiff the following telegraphic message sent to him by his wife: "Sedalia, Mo., Dec. 13, 1889. To Matt Connell, Soldiers' Home, Leavenworth, Kansas: Your child is dying. Mary." The plaintiff alleged that his wife paid the customary charge, 50 cents, for its transmission, and that he had refunded that sum to her. Plaintiff then alleges that his child died on the 24th day of December, 1889, "and that if said message had been transmitted and delivered with any degree of diligence or promptness whatever, he would have been able to be present with his said child during its last sickness, and at its death, and that by reason of the great negligence and carelessness of defendant in failing to deliver said message, and of his being thereby deprived of being with his said child during its last sickness, and at its death, he lost, not only the fifty cents paid for sending said message, but also suffered great anguish and pain of mind and body, and was physically and mentally prostrated when he learned that his child had died, and been buried, without knowledge on his part of its sickness and death." He alleges that he was an inmate of the soldiers' home from December 13, 1889, continuously, till February 21, 1890, and by the slightest diligence he could have been found. He alleges, further, that he is damaged in the sum of $5,000, for which he prays judgment. On motion of defendant the circuit court struck out of the petition the words, "but also suffered great anguish and pain of mind and body, and was physically and mentally prostrated, when he learned that his child had died, and had been buried, without knowledge on his part of its sickness and death." This left the action pending for the 50 cents only, and, plaintiff declining to amend, the court sustained another motion to dismiss for want of jurisdiction of the subject-matter of the action.

The sole question discussed by the appellant in this case is this: "Where a telegraph company is advised by the contents of a message that great mental suffering and pain will naturally result from its neglect to transmit and deliver the message promptly, can damages be recovered by the sendee for such mental agony and distress, caused by a failure to promptly transmit and deliver?" The proposition, it will be observed, relates simply to damages arising from a breach of contract. Prior to this time there had been but one opinion expressed in the decisions of this court, and that is clearly adverse to the contention of the appellant, and this is not questioned by the able counsel who represents the appellant; but he urges that, inasmuch as telegraphy is of comparatively recent origin, we should, in view of the function it performs, make an exception in the construction of the contracts made by those engaged in it, and the damages which flow from a breach thereof. That an action for mental anguish, disconnected with physical injury, for the breach of a contract, could not be maintained at common law, with the single exception of the breach of a marriage contract, we think, is abundantly established. Wood, Mayne, Dam. 75; Lynch v. Knight, 9 H. L. Cas. 577; Walsh v. Railroad Co., 42 Wis. 23; Wyman v. Leavitt, 71 Me. 227. The subject came under view in this court in Trigg v. Railway Co., 74 Mo. 147. In that case a lady, with two little children, was carried beyond the station to which she was traveling. It was not claimed that any indignity was offered, or that she suffered personal injury. The trial court instructed that the jury might award her damages for the anxiety and suspense of mind suffered in consequence of the delay in reaching her destination. This court, in reversing the cause, said: "The instruction as to the measure of damages was erroneous. Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, as no personal injury was received by the plaintiff, and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger." The general rule is that "pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity;" citing Pierce, R. R. (1881) 302; Railway Co. v. Birney, 71 Ill. 391. The authority of this case has never been questioned by the courts of this state, to our knowledge. The rule announced is in strict harmony with that of the courts of last resort in our sister states, until, in 1881, the supreme court of Texas, in So Relle v. Telegraph Co., 55 Tex. 308, announced the doctrine that the sender of a social telegram could recover for the mental anguish caused by delay in its delivery. The authorities relied upon by the supreme court of Texas in that case were actions for physical injuries, in which the mental agony formed an inseparable part,—a doctrine never questioned in this state since Porter v. Railroad Co., 71 Mo. 66. The learned commissioner who prepared the opinion did quote a suggestion of the authors of Shearman & Redfield on Negligence, to the effect that they thought such an action ought to lie, but they did not claim that any court in this country or England had previously sustained their view. The Texas case has been followed in that state in a great number of cases, and has been adopted in Indiana, North Carolina, Kentucky, Alabama, and Tennessee. On the other hand, this new departure has been vigorously assailed and denied by the supreme courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge Lurton, of the supreme court of Tennessee, now judge of the United States circuit court for the sixth circuit, in which Folkes, J., concurred. The majority of the supreme court of Tennessee do not go to the length contended for by the appellant here. The majority lay great stress upon the fact that by virtue of a statute in Tennessee a cause of action is given to the aggrieved party for damages for failure to deliver any message. Hence they argue that, as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible to escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. The case of So Relle v. Telegraph Co., 55 Tex. 310, has been nowhere more flatly repudiated than by the supreme court of Texas itself, in Railway Co. v. Levy, 59 Tex. 563. Judge Stayton, in an able and lucid discussion of the authorities, demonstrates "that the cases in which damages have been allowed for mental distress * * * was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property, in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in which the bodily injury or other wrong was suffered by one person, and the mental distress by another." The reasoning of the supreme court of Tennessee —that, because the Code gave an action for some damages, that opened the way to add damages for mental distress—is, we think, at complete variance with our own decisions. In this state we have a damage act which gives a right of action where death has resulted, and similar statutes exist in most of the states. The construction placed upon these statutes has been that no relative, save those named in the statute, can recover at all, and no recovery as a solatium for mental suffering is allowed, where not expressly given by the statute. Field, Dam. 498; Porter v. Railroad Co., 71 Mo. 66; Parsons v. Railroad Co., 94 Mo. 286, 6 S. W. Rep. 464; Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. Rep. 924.

But it is said damages for injury to the feelings have always been allowed in actions founded upon a breach of promise to marry, and this is true in this as in other states. Wilbur v. Johnson, 58 Mo. 600; Bird v. Thompson, 96 Mo. 424, 9 S. W. Rep. 788. But it has always been regarded as an exception to the rule. In this action, plaintiff's pecuniary loss forms an important element. The action is of common-law origin, and at common law the husband, on marriage, became liable for the wife's debts, and for support in a manner and style commensurate with his own social standing, and evidence of his station in life and financial condition has always been admitted. Wilbur v. Johnson, supra. As was well said by Cooper, J., in Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. Rep. 823: "This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort; and, though the damages recoverable for the plaintiff for mental suffering are spoken of as 'compensatory,' the fervent language of the courts indicates how shadowy is the line that separates them from those strictly pecuniary." Harrison v. Swift, 13 Allen, 144; Kurtz v. Frank, 76 Ind. 595; Thorn v. Knapp, 42 N. Y. 475; Coryell v. Colbaugh, 1 N. J. Law, 77. "Especially those cases in which evidence of seduction is admitted to ascertain the damages. So much, indeed, does the motive of the defendant enter into the question of damages, that in Johnson v. Jenkins, 24 N. Y. 252, the defendant was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health."

These considerations sufficiently indicate the reasons that actuated the courts to make this exception. Few precedents for this action will be found where the defendant was impecunious. The learned counsel has collected various other cases in which mental anguish was recognized as an element of damage, and concludes with the query, "If allowed in these, why not in this action?" Let us consider these in the order of his brief: Assault and battery. Under this head is cited the case of Craker v. Railway Co., 36 Wis. 657. In that case the conductor of a train seized upon the moment when the other employes were absent from the car to take improper liberties with a lady passenger. The evidence showing that he placed his arm around her, and, against her vehement protests, kissed her. It was a clear physical violation of her person, which the courts have ever held constituted an assault and battery, and actionable. The law redresses such a wrong in its initial stages. The protection of the person has ever been an object of great solicitude to the common law. The present ability of actual violence often justifies recourse to extreme measures in preventing a consummation of threatened wrong to the person. The cases cited under this head clearly add no weight to plaintiff's claim. The cases of malicious prosecution and false imprisonment come under that general class of willful wrong to the person, affecting the liberty, character, reputation, personal security, and domestic relations. Judge Lumpkin, in Chapman v. Telegraph Co., (Ga.) 15 S. E. Rep. 901, disposes of the argument attempted to be drawn from this class as follows: "In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to deprive his creditors, it was held (by a divided court) that the mortification was a part of the actual damages. Byrne v. Gardner, 33 La. Ann. 6. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. Fisher v. Hamilton, 49 Ind. 341; Stewart v. Maddox, 63 Ind. 51; Coleman v. Allen, 79 Ga. 637, 5 S. E. Rep. 204. Of course, such injuries are essentially willful, and, besides, are violations of the great right of personal security or personal liberty." As to the action of seduction, every lawyer knows that proof of some service by the daughter has been invariably required to sustain it; and the same rule is rigidly adhered to in Magee v. Holland, 27 N. J. Law, 86, to which we are cited by counsel, for the forcible abduction of a daughter. In the case of enticing away a daughter, we are referred to Stowe v. Heywood, 7 Allen, 118. The court permitted damages for mental suffering on the express ground that it was a willful injury, and declined to say whether such damages could ever be recovered for negligence alone, as in the case at bar. This case illustrates the greatest difficulty in estimating damages for mental suffering. Judge Metcalf says: "Mental suffering cannot be measured aright by outward manifestations, for there may be a show of great distress where little or none is felt. And great distress may be concealed, and borne in silence, with an apparently quiet mind. Ab inquieto saepe simulatur quies." "And we nowhere find that any other evidence of mental suffering, besides that of the injury which was the alleged cause of action, was ever before admitted." The court reversed the case because the trial court permitted evidence "tending to show" plaintiff suffered from "pain and anxiety of mind." It is hardly necessary to add that in a case of libel or slander, if the words are not actionable per se, special damages must be alleged and proved. When they are actionable per se, they are construed because of their evident tendency to degrade the citizen in the estimation of his neighbors, and in both cases they are malicious. We have now gone through the list, and we find in none of them any reason for adopting the rule that, for the mere negligent failure to comply with a contract, damages may be recovered on the sole ground of injured feelings, when the plaintiff has suffered no physical injury. The law, up to this time, has essayed to protect the person and property of the individual. All the cases cited are based upon this principle. Reputation is included in the person. Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. Rep. 250.

The damages claimed in this action cannot be allowed as exemplary damages. The Texas court, in one case, did so hold, but afterwards repudiated it. Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. Rep. 351. But we do not think that the courts of England and of this country, prior to 1881, were rejecting actions like this on a mere arbitrary assumption, unsustained by reason. A doctrine which has passed so long unchallenged by the great jurists who have adorned the bench of our state and federal courts is not to be lightly discarded at the behest of ingenious and able counsel. The law is, and ought to be, more stable than this. It has long been the boast of common-law writers that the common law was a system founded upon reason; and one of its maxims has ever been that, when the reason upon which a law was based ceased, the law itself ceased. Speaking for ourselves, we are satisfied that the common law, denying an action for mental distress alone, was founded upon the best of reason, and an enlightened public policy. And we question if the real reasons were ever more clearly and satisfactorily stated than by Judge Lurton, which opinion we adopt: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority of the supreme court of Tennessee." "It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress, and humiliation, when such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully, with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language, not charging a crime, or resulting in special pecuniary damages? Mental distress is, or may be in some cases, as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime; yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered."

Why, if this rule is to become the law of this state in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers; so are railroad companies; and yet this court, in the Trigg Case, held the company not liable for mental anguish, as an independent cause of action for a mere act of negligence. A similar conclusion was also reached in the United States circuit court for the fourth circuit in Wilcox v. Railroad Co., 52 Fed. Rep. 264, 3 C. C. A. 73, where the plaintiff made a special contract for a train to take him to the bedside of a sick parent. The court held that the trouble of mind caused by the delay at a railroad station could not be made the basis of an action, saying: "But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action." "The plaintiff was the subject of two mental pains,—one, for the condition of the sick person; the other, from the delay at the station,—the latter, only, being the subject of this action." "It cannot be pretended that damages from the latter cause of 'anxiety' and 'suspense'—uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay—was in the contemplation of the defendant when it entered into the contract." Griffin v. Colver, 16 N. Y. 489; Telegraph Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. Rep. 577. But, as before said, if we establish the rule as to one common carrier or private person, with what sort of consistency can we refuse to extend it to all? The courts of Texas have already spoken of a similar case as "intolerable litigation." We see no reason for making this innovation or exception. The legislature has imposed a penalty for each infraction of its duty in delaying a message, and it seems very clear to us that, if it is to become the policy of the state to adopt this new rule, the legislature, and not this court, should do it. The common law has always attempted to deal with the citizen, and his rights and wrongs, in a practical way, and the declared object of awarding damages is to give compensation for pecuniary loss. The right, in a civil action, to inflict punishment by way of punitory damages, has been ably controverted. The allowance of damages for wounded feelings, when they are the concomitant or result of a physical injury, is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole, and its effects were not separable; but the experience of every judge and lawyer teaches him how unsatisfactory, in these personal injury cases, are the verdicts of juries. They are utterly inconsistent, and the courts do not attempt to justify these inconsistencies upon any other theory than that it is the sole province of the jury to fix the amount. The result is that, in nearly every appeal that reaches this court, one ground for reversal is the excessive damage awarded; and the right of this court to interfere at all on this ground is seriously challenged. It is no uncommon thing to have the appellee voluntarily enter a remittitur to save his verdict from the charge of passion or prejudice. Under these circumstances, is it wise to venture upon the far more speculative field of mental anguish, without guide and without compass? We think not. We have examined the cases in the courts of Kentucky, Indiana, Tennessee, Alabama, and North Carolina. They are all based upon the So Relle Case, in 55 Tex. 308, which, we have shown, stands upon no previous adjudication, but is opposed by the Levy Case, in 59 Tex., which, to our minds, completely refutes it. The cases holding this view are Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. Rep. 351; Railroad Co. v. Wilson, 69 Tex. 739, 7 S. W. Rep. 653; Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. Rep. 598; Same v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734; Same v. Simpson, 73 Tex. 423, 11 S. W. Rep. 385; Same v. Adams, 75 Tex. 531, 12 S. W. Rep. 857; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574; Reese v. Same, 123 Ind. 294, 24 N. E. Rep. 163; Beasley v. Same, 39 Fed. Rep. 181; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. Rep. 419; Thompson v. Telegraph Co., 106 N. C. 549, 11 S. E. Rep. 269; Chapman v. Same, (Ky.) 13 S. W. Rep. 880; Young v. Same, 107 N. C. 370, 11 S. E. Rep. 1044; Thomp. Elect. § 378, and cases cited. The cases opposing this view are, notably, the dissenting opinion of Judge Lurton in Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. Rep. 574; Chapman v. Telegraph Co., (Ga.) 15 S. E. Rep. 901, in which Judge Lumpkin, of the supreme court of Georgia, reviews all the cases in a most admirable tone, and with great clearness; Wilcox v. Railroad Co., (4th circuit,) 52 Fed. Rep. 264, 3 C. C. A. 73; Crawson v. Telegraph Co., 47 Fed. Rep. 544; Chase v. Same, 44 Fed. Rep. 554, where all the authorities are cited; West v. Same, 39 Kan. 93, 17 Pac. Rep. 807; Russell v. Same, 3 Dak. 315, 19 N. W. Rep. 408; Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. Rep. 823; Lynch v. Knight, 9 H. L. 577; Commissioners v. Coultas, L. R. 13 App. Cas. 222; Tyler v. Telegraph Co., 54 Fed. Rep. 634; Kester v. Telegraph Co., (Taft, Judge,) 55 Fed. Rep. 603.

We are fully aware that the plaintiff's claim appeals strongly to the sensibilities; but to adopt that view we must either be guilty of adopting one rule of damages for one class of common carriers, and the breach of their contracts, or we must conclude that all of our predecessors in the great common-law courts were at fault, and henceforth repudiate, not only their utterances, but our own, on this subject, and this we have no inclination to do. We prefer to travel yet awhile super antiquas vias. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case. Our conclusion is, the judgment should be and is affirmed. All concur.

DWYER v. CHICAGO, ST. P., M. & O. RY. CO.

(51 N. W. 244, 84 Iowa, 479.)

Supreme Court of Iowa. Feb. 1, 1892.

Appeal from district court, Plymouth county; Scott M. Ladd, Judge.

Action for personal injury. Judgment for plaintiff and the defendant appealed.

J. H. & C. M. Swan, for appellant. Joy, Hudson, Call & Joy, for appellee.

GRANGER, J. 1. The plaintiff is the administrator of the estate of Ann Dwyer, deceased, who was on the 9th day of July, 1889, struck by defendant's cars, as a result of which she died about 30 days thereafter. The petition specifies the injuries sustained, and adds: "All of which caused her great pain and suffering for a period of about thirty days, when she died from such injuries." A motion to strike out the words as to pain and suffering was overruled, and the court instructed the jury that, if it found for the plaintiff, to allow a "reasonable compensation for pain and suffering." The jury returned a general verdict for the plaintiff for $3,000, and specially found that $2,300 of the amount was for "pain and suffering," and $700 "as damages to the estate." An assignment brings in question the correctness of the court's action in permitting the jury to consider pain and suffering as an element of damage. The action was commenced after the death of plaintiff's intestate. If the action had been commenced in her life-time, it is unquestioned that pain and suffering caused by the injury would have been a proper element of damage; and this would be true if, after the commencement of the action, she had died, and her administrator had been substituted as party plaintiff, and prosecuted the suit to judgment. Muldowney v. Railway Co., 36 Iowa, 462. We come, then, to the important inquiry if such damages are permissible in such a case, where the action is commenced by the administrator. The only authority for maintaining such an action by the legal representative is by virtue of the statute. At the common law, the cause of action abated with the death of the injured party. The law authorizing the action is found in Code, § 2525. "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." We are cited to no case, in this or any other state, where the rule contended for by the appellee, and allowed by the district court, has been sustained. It is claimed, however, that the reason for this, as to other states, is because of the peculiarity of the statutes under which such actions are permitted to survive. In several cases this court has expressed its view as to the measure of damages in such cases, and in such a way that the appellant regards the law on this point as settled in its favor, while the appellee regards the language thus relied upon as merely incidental to other points determined, and in no way decisive of the question now before us. It is true that the precise question now before us was not involved for determination in any of the Iowa cases cited, and the language relied upon by the appellant has been used incidentally in the discussion of other questions; but it is not to be understood, because of this, that such language is without value in our deliberations on this question; for much of the language so used is in regard to questions so allied to this in its legal significance as to make them determinable upon quite similar considerations. For instance, the rule as to the measure of damage in cases of this kind has been considered, and, with the point before us in view, a rule excluding such damage has been adopted.

In Rose v. Railway Co., 39 Iowa, 246, it is said: "The action is brought by the administrator for the injury to the estate of the deceased sustained in his death. There is therefore no basis for damage for pain and suffering. * * * Compensation for the pecuniary loss to his estate is alone to be allowed." See, also, Donaldson v. Railway Co., 18 Iowa, at page 290, and Muldowney v. Railway Co., 36 Iowa, at page 468. In the latter case the action was commenced by the injured party, who died pending the suit, and his administrator was substituted; and it was held that pain and suffering were proper elements of damage because of the action having been commenced by the injured party; but the court guards the rule by saying: "A different rule would obtain if the action had been commenced after his death." It is thought that the expression may be accounted for on the theory that the case was determined under a different statute. Rev. St. § 3467, under which the action arose, is as follows: "No cause of action ex delicto dies with either or both of the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." With reference to the particular matter under consideration, it is difficult to trace a distinction between the statutes. The one says, in effect, that such causes of action shall survive the party, and the other that it does not die with the party. The effect of each is to create a survival, and the one, as plainly as the other, contemplates the existence of the cause of action before the death. It is not the effect of either, as seems to be thought by the appellee, to create a cause of action because of the death. The statutes deal with the "cause of action," and not with the rule of damage to be applied. In fixing the damage, we look to the wrong to be remedied; to the injury to be repaired. If the action is brought by the injured party, the law attempts to remedy the wrong to him,—not specifically to his estate,—and that may include loss of property, time, and that bodily ease and comfort to which he is entitled as against the wrong-doers. If the action is brought to repair an injury to his estate, the law looks, in fixing the rule of damage, to how the estate is affected by the act, and attempts to repair the injury. Loss of time and expenses paid, as a result of the wrong, presumably lessen the estate; but bodily pain and suffering in no manner affect it. It is an item of damage peculiar to the person, and not to pecuniary or property rights. Under our statute, these damages belong "to the estate of the deceased." Code, § 2526. This distinction is maintained throughout all the cases and authorities that have come to our notice. This court has repeatedly said that these actions are for "injury to the estate." See cases cited supra: Rose v. Railway Co., Donaldson v. Railway Co., Muldowney v. Railway Co. Mr. Sutherland, in his work on Damages, (volume 3, p. 282,) speaking in general of these statutes of survival of actions, says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. It is only for pecuniary injuries that this statutory right of action is given. Although it can be maintained only in cases in which an action could have been brought by the deceased if he had survived, damages are given on different principles and for different causes. Neither the pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives, can be taken into account in the estimate of damages." In Railway Co. v. Barron, 5 Wall. 90, a like case, it is said, speaking of the wife or next of kin, who, under the Illinois statutes, are the beneficiaries in such a case: "They are confined to the pecuniary injuries resulting to the wife and next of kin; whereas, if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount." The language of the Illinois statute is different in phraseology from ours, but not to the extent of inducing a different rule in this respect. Under the statute of Minnesota, so similar to ours as to justify the same rule as to these damages, it is held that "no compensation can be given * * * for the pain and suffering of the deceased." Hutchins v. Railway Co. (Minn.) 46 N. W. 79. We conclude, without doubt, that the district court erred in its ruling on the motion and the instruction to the jury. Some other questions are argued which we have examined, the consideration of which would require extensive quotations from the evidence, and we think they do not involve reversible error, and it is unnecessary to discuss them. The cause is remanded to the district court, with instructions to deduct from the judgment entered the $2,300 allowed for pain and suffering, and give judgment for the balance. Modified and affirmed.

MORGAN v. SOUTHERN PAC. CO. (No. 14,842.)

(30 Pac. 603, 95 Cal. 510.)

Supreme Court of California. Aug. 5, 1892.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by Flora Morgan against the Southern Pacific Company to recover damages for the death of her child caused by defendant's negligence. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

The facts fully appear in Morgan v. Pacific Co., 30 Pac. 601.

E. L. Craig, Foshay Walker, Horace Hawes, and R. B. Carpenter, for appellant. Charles G. Lamberson, Lamberson & Taylor, and J. W. Ahern, for respondent.

McFARLAND, J. The parties to this action are the same as in Morgan v. Pacific Co., 30 Pac. Rep. 601 (No. 14,841, this day decided), in which plaintiff recovered a judgment for $15,000 for alleged personal injuries received by being thrown from the steps of defendant's car, which judgment was by this court affirmed. When she fell from the steps of the car she had in her arms her infant daughter, aged about two years. Nine days afterwards the child died from an attack of pneumonia; and plaintiff brought this present action to recover damages for the death of said child, upon the theory that the pneumonia was caused by said fall. The jury gave her damages in the amount of $20,000, for which sum judgment was rendered; and defendant appeals from the judgment, and from an order denying a motion for a new trial. The evidence upon the issues of the alleged negligence of defendant's employes at the time of the accident, and the alleged contributory negligence of plaintiff, was substantially the same as in the other case, and as to those issues the verdict cannot be disturbed. There was some evidence tending slightly to show that the death of the child was caused by the accident, but it is not necessary to inquire whether or not it was sufficient to establish that fact, because the judgment must clearly be reversed on account of the excessive damages awarded by the jury.

There was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars;" and there was no evidence whatever introduced or offered upon the subject of damage. The jury, therefore, had nothing before them upon which to base damages except the naked fact of the death of a female child two years old; and it is apparent, at first blush, that "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." The main element of damage to plaintiff was the probable value of the services of the deceased until she had attained her majority, considering the cost of her support and maintenance during the early and helpless part of her life. We think that the court erred in charging that "the jury is not limited by the actual pecuniary injury sustained by her, by reason of the death of her child." An action to recover damages for the death of a relative was not known to the common law; it is of recent legislative origin. There are statutes in many of the American states providing for such an action, and it has been quite uniformly held that in such an action the plaintiff does not represent the right of action which the deceased would have had if the latter had survived the injury, but can recover only for the pecuniary loss suffered by the plaintiff on account of the death of the relative; that sorrow and mental anguish caused by the death are not elements of damage; and that nothing can be recovered as a solatium for wounded feelings. The authorities outside of this state are almost unanimous to the point above stated. The following are a few of such authorities: Railroad Co. v. Vandever, 36 Pa. St. 298; Iron Co. v. Rupp, 100 Pa. St. 95; Railroad Co. v. Freeman, 36 Ark. 41; Railroad Co. v. Brown, 26 Kan. 443; Pennsylvania Co. v. Lilly, 73 Ind. 252; Donaldson v. Railroad Co., 18 Iowa, 280; Railroad Co. v. Paulk, 24 Ga. 356; Railroad Co. v. Miller, 2 Colo. 466; Kesler v. Smith, 66 N. C. 154; March v. Walker, 48 Tex. 372; Railroad Co. v. Levy, 59 Tex. 563; James v. Christy, 18 Mo 162; Hyatt v. Adams, 16 Mich. 180; Chicago v. Major, 18 Ill. 349; Railroad Co. v. Delaney, 82 Ill. 198; Blake v. Railroad Co., 18 Q. B. 93.

With respect to the decisions in this state we do not think those cited by respondent (except one) are, when closely examined, inconsistent with the general authorities. Beeson v. Mining Co., 57 Cal. 20, is a leading case on the subject, and is cited by all the cases which follow it. In that case the action was brought by the widow for the death of her husband, and the question was whether or not the lower court erred in allowing evidence of the kindly relations between the plaintiff and the deceased during the lifetime of the latter. The court sustained the ruling of the court below, but clearly upon the ground that those relations could be considered only in estimating the pecuniary loss. The court say: "It is true that in one sense the value of social relations and of society cannot be measured by any pecuniary standard; * * * but, in another sense, it might be not only possible, but eminently fitting, that a loss from severing social relations, or from deprivation of society, might be measured or at least considered from a pecuniary standpoint. * * * If a husband and wife were living apart by mutual consent, neither rendering the other assistance or kindly offices, the jury might take into consideration the absence of social relations and the absence of society in estimating the loss sustained by either from the death of the other. So if the husband and wife had lived together in concord, each rendering kindly offices to the other, such facts might be taken into consideration, not, as the books say, for the purpose of affording solace in money, but for the purpose of estimating pecuniary losses. The loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy." A quotation is made from a Pennsylvania case where the same rule was applied to the loss of a wife, the court saying that "certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." The Beeson Case, therefore, does not decide that the jury may depart from a pecuniary standpoint in assessing damages; it merely holds that in estimating the pecuniary losses of a wife from the death of her husband they may consider whether or not the deceased was a good husband, able and willing to provide well for his wife. The opinion of the court no doubt goes somewhat further in this direction than the general current of authorities, but it decides nothing more than above stated. Cook v. Railroad Co., 60 Cal. 604, also cited by respondent, decides nothing more than the Beeson Case. In McKeever v. Railroad Co., 59 Cal. 300, the point was not involved, and in Nehrbas v. Railroad Co., 62 Cal. 320, the point does not appear in any way to have been involved; and the dictum at the close of the opinion, as it refers to the Beeson Case, must be held as only intended to go to the length of the latter case. It is true, however, that in Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. 269, a decision in department, views were expressed favorable to respondent's contention. The opinion of the commission in that case was, however, expressly based on Beeson v. Mining Co., supra, and upon, as we have seen, a misunderstanding of that case. There appears to have been no petition for a hearing in bank. It was stated in that case that there could be a recovery for the "mental anguish and suffering of the parents," but we have been referred to no other case that holds such doctrine. Certainly it was not so held in the Beeson Case. But entirely contrary views were expressed in the latest decision of this court on the subject (Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303). In that case—which was for the death of an adult son—the lower court had instructed that the jury in estimating the damages might consider "the sorrow, grief, and mental suffering occasioned by his death to his mother;" and this court held the instruction erroneous, and for that reason reversed the judgment, the court holding that such a rule would afford an "opportunity to run into wild and excessive verdicts." The court said: "We are of opinion that the court erred in including in the instruction the words, 'sorrow, grief, and mental suffering, occasioned by the death of the son to his mother.' In thus directing the jury the court fell into error. In our opinion, the damage should have been confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of the deceased. * * * We have found no case in which damages for sorrow, grief, and mental suffering are allowed, under any of the statutes." And, further, that the statutory action is a new one, "and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury." The case was decided in bank. Justice Thornton delivered the opinion, which was concurred in by two other justices, and a fourth justice concurred in the judgment, and must, therefore, have concurred in the one main reason for which the judgment was reversed. He may not have been ready to say that the "comfort and society" of the deceased could be considered. There was only one dissent, but upon what ground does not appear. We think, therefore, that the case is full authority on the main point. At all events, we think that the opinion states the general propositions of law governing the case correctly, although, as to one matter, it may be misunderstood. The language, "the loss of the comfort, society, support, and protection of the deceased," must be held as having been used within the meaning given to it in Beeson v. Mining Co., supra, as hereinbefore stated, that is, with reference to the value of the life of the deceased, and the pecuniary loss to the plaintiff caused by the death. The said language would not be correct in any other sense. But in the case at bar the jury were not confined by the instructions to pecuniary loss or any other kind of loss; they were given wide range to run into any wild and excessive verdict which their caprice might suggest. We do not think that the complaint is defective because it does not specially aver the loss of the services of the deceased; that was a natural and necessary sequence of the death. It was not special damage necessary to be averred. There is nothing in the point made by respondent that the answer was not verified. Upon that point the court ruled in favor of defendant, and plaintiff is not appealing. The judgment and order appealed from are reversed, and a new trial ordered.

SHARPSTEIN, J. I concur.

DE HAVEN, J. I concur in the judgment and generally in the foregoing opinion. The measure of damages in actions by a parent for the death of a child, when the facts are not such as to warrant exemplary damages, is correctly stated in section 763 of Shearman and Redfield on Negligence, as follows: "The damages recoverable by a husband, parent, or master for a negligent injury to the person of his wife, child, or servant are strictly limited to an amount fully compensatory for the consequent loss of service for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like." The sixth instruction given upon the request of plaintiff, to the effect that "in estimating the damage sustained by her the jury is not limited by the actual pecuniary injury sustained by her by reason of the death of her child, but such damages may be given as under all the circumstances of the case may be just," is contrary to this rule, and was erroneous. The object of section 376 of the Code of Civil Procedure is not to give redress or compensation for the mental distress of a mother, consequent upon the death of her child. The general language of section 377 of the Code of Civil Procedure, that in actions of this character "such damages may be given as under all the circumstances of the case may be just," is used with reference to the fact that the damages which are allowed to be recovered by sections 376 and 377 of the Code of Civil Procedure are, with the exception of the expenses incurred by the plaintiff in consequence of the injury resulting in the death for which they are claimed, prospective in their nature, relating, as they do, to the loss of future service, and necessarily based upon probabilities, and upon data which in many respects are uncertain, and therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury; and all that is meant by the language quoted is that the jury shall, in view of all the circumstances of the case, and considering also the age and the ability of the deceased to serve the relative for whose benefit the action is brought, give such damages as they shall deem just, keeping in view that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.

Hearing in bank denied.

DEMAREST et al. v. LITTLE.

(47 N. J. Law, 28.)

Supreme Court of New Jersey. Feb. Term, 1885.

Argued at November term, 1884, before BEASLEY, C. J., and DIXON, REED, and MAGIE, JJ.

B. Williamson, for the rule. John Linn, opposed.

MAGIE, J. This action was brought to recover damages for the death of plaintiff's testator, which occurred in the disaster at Parker's Creek Bridge, on the Long Branch Railroad, on June 29, 1882. Defendant was charged with responsibility therefor as receiver of the Central Railroad Company of New Jersey, and as having, in that capacity, contracted to carry deceased with due care.

The case was first tried in 1883, and a verdict rendered for plaintiffs, assessing their damages at $30,000. This verdict was afterwards set aside upon a rule to show cause. No opinion was delivered, but the court announced that a new trial was allowed because the damages were excessive. The case has been again tried, and the verdict has been again rendered for plaintiffs, assessing their damages at $27,500. A rule to show cause was allowed, and is now sought to be made absolute upon the following grounds: First, that the evidence was not sufficient to justify the conclusion that testator's death was due to negligence or want of care; second, that if so, defendant, as receiver, was not liable for any negligence except his own, while the alleged negligence was that of employés; and third, that the damages awarded are excessive.

Upon the first ground it was urged that the evidence upon this trial was variant from and more favorable to defendant than that produced on the former trial. Whether that be so or not, a careful perusal of the evidence satisfies me that there was sufficient to warrant the conclusion that testator's death was due to negligence or want of proper care.

The second objection has already been disposed of in a case growing out of this same disaster, and in which the court of errors has affirmed the responsibility of the receiver for such negligence. Little v. Dusenberry, 46 N. J. Law, 614. The verdict ought not to be disturbed on those grounds.

The question presented by the claim that the damages are excessive is of more difficulty. The action is created by statute, which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be "the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased." Paulmier v. Railroad Co., 34 N. J. Law, 151. Compensation for such deprivation is therefore the sole measure of damage in such cases. A difficult task is thereby imposed upon a jury, for they are obliged to determine probabilities, and "must, to a large extent, form their estimate of damages on conjectures and uncertainties." But the case in hand seems to present less complicated problems than other cases of the same nature.

Deceased left no widow, and but three children. All of them had reached maturity. Two sons were self-supporting; the daughter was married. He owed no present duty of support, and there is nothing to show any fixed allowance or even casual benefactions to them. They are therefore deprived of no immediate pecuniary advantage derivable from him. At his death he was in business, in partnership with his sons and son-in-law. All the partners gave attention to the business and the capital was furnished by deceased. His death dissolved the partnership and deprived the surviving partners of such benefit as they had derived from his credit, capital, skill and reputation. But the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from the severance of a relation of kinship and not of contract. No damages could be awarded on that ground.

Defendants strenuously urge that, outside of the partnership or in the event of its dissolution, the next of kin had a reasonable expectation of deriving from the parental relation an advantage by way of services rendered or counsel given by deceased in their affairs. A claim of this sort must be carefully restricted within the limits of the statute. The counsels of a father may, in a moral point of view, be of inestimable value. The confidential intercourse between parent and child may be prized beyond measure, and its deprivation may be productive of the keenest pain. But the legislature has not seen fit to permit recovery for such injuries. It has restricted recovery to the pecuniary injury; that is, the loss of something having pecuniary value.

Now, it may with some reason be anticipated that a father, out of love and affection, might, if circumstances rendered it proper, perform gratuitous service for a child, which by rendering unnecessary the employment of a paid servant, would be of pecuniary value, and that he might, by advice in respect to business affairs, be of a possible pecuniary benefit. But whether such an anticipation is reasonable or not must depend on the circumstances. Considering the age, the assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small. Indeed, it would not be too much to say that resort must be had to speculation to discover any such advantage. At all events, compensation for this injury in this case could not exceed a small sum without being excessive.

The principal basis for plaintiff's claim is obviously this: That the death of deceased put an end to accumulations which he might have thereafter made and which might have come to the next of kin. Deceased had accumulated about $70,000, all of which, except $10,000 capital invested in the business, seems to have been placed in real estate and securities as if for permanent investment. By his will the bulk of his property was given to his children. At his death he had no other sources of income than his investments and his business.

In determining the probability of accumulations by deceased if he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. On the contrary, it is rather a benefit to them to receive at once the whole fund in lieu of the mere contingency or probability of receiving it, though with its accumulations (at best uncertain), in the future. Indeed, the benefit thus accruing to the next of kin in receiving at once this whole property, in the view of one of the court, is at least equivalent to the present value of the probability of their receiving it hereafter, if deceased had continued in life, with all his probable future accumulations from any source whatever, in which case it is evident that his death has not resulted in any pecuniary injury to them. But without adopting this view of the evidence, it is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His receipts from the business for the two years it had been conducted were proved. What he expected was not proved, but left to be inferred for his mode of life. At death he was about fifty-six and a half years old, and by the proofs had an expectation of life of sixteen and seven-tenths years.

From these facts the jury were to find what deceased would probably have accumulated, what probability there was that his next of kin would have received his accumulations, and then what sum in hand would compensate them for being deprived of that probability. In what manner the jury attempted to solve this problem we cannot ascertain. Plaintiffs' counsel attempts to show the correctness of the result reached, by calculation. He assumes the income of deceased from his business during the last year as the annual income likely to be obtained, and deducts only $1,000 each year as the probable expenditure of deceased, and then finds the present worth of the net income so determined for the deceased's expectation of life is $27,710.-32.

This calculation tests the propriety of this verdict, and in my judgment conclusively shows that it was rather the result of sympathy or prejudice than a fair deduction from the evidence. For, assuming the amount attributable to the loss of deceased's services was but small (and if more it was excessive), the award of the jury on this account was but a few hundred dollars less than the present worth of the full net income if received for his full expectancy of life. To reach such a result the jury must have found every one of the following contingencies in favor of the next of kin, viz.: That deceased, who had already acquired a competence, would have continued in the toil of business for his full expectancy of life; that he would have retained sufficient health of body and vigor of mind to enable him to do so, and as successfully as before; that he would have been able to avoid the losses incident to business, and would have safely invested his accumulations; and that the next of kin would have received such accumulations at his death. A verdict which attributes no more weight than this has, to the probability that one or more of all these contingencies would happen, cannot have proceeded from a fair consideration of the case made by the evidence.*

Having reached this conclusion, what should be the result as to the verdict? The charge of the court below declared the rule of damages with accuracy. The verdict is a second one, and somewhat smaller than that previously set aside as excessive. It is unusual to set aside a second verdict, but though unusual it is within the power of the court in the exercise of its discretion. That power will be discreetly used in setting aside any verdict which does palpable injustice.

To obviate, if possible, the necessity of another trial, it has been determined that if plaintiffs will reduce their verdict to $15,000 by remitting the excess, the verdict may stand for that sum, and the rule to show cause be discharged. Unless they consent to such remission, the rule must be made absolute.

DWIGHT v. ELMIRA, C. & N. R. CO.

(30 N. E. 398, 132 N. Y. 199.)

Court of Appeals of New York, Second Division. March 15, 1892.

Appeal from supreme court, general term, Fourth department.

Action by Ira Dwight against the Elmira, Cortland & Northern Railroad Company. From a judgment for plaintiff entered on an order affirming a judgment entered on the report of a referee, defendant appeals. Reversed.

James Armstrong, for appellant. Raymond L. Smith, for respondent.

PARKER, J. The judgment awards to the plaintiff $503 for damages occasioned by the defendant's negligence in setting on fire and destroying 21 apple-trees, 2 cherry-trees, and 2½ tons of standing grass, and also injuring 7 apple-trees, the property of plaintiff. The only question presented on this appeal is whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: "Question. What were those twenty-one trees worth at the time they were killed?" Objection was made that the evidence did not tend to prove the proper measure of damages, but the objection was overruled, and the answer was: "Answer. I should say they were worth fifty dollars apiece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken. Testimony was also given, tending to prove that the land burned over by the fire was depreciated in value $30 per acre. The only evidence offered by the plaintiff, touching the question of damages, was of the character already alluded to.

Fruit-trees, like those which are the subject of this controversy, have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose; but, while connected with the land, they have a producing capacity which adds to the value of the realty. Necessarily the testimony adduced tended to show, not the value of the trees severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit. How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions and attempted to be secured by the answers. Can the owner of an injured freehold because the trees taken or destroyed happen to be fruit instead of timber trees, have his damages measured in that manner? is the question presented now, for the first time, in this court, so far as we have observed. The learned referee followed the decision in Whitbeck v. Railroad Co., 36 Barb. 644, in which the proposition is asserted that, while fruit-trees form a part of the land, the true rule is that if the thing destroyed has a value which can be accurately measured without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. The court cited no authority for the conclusion reached, and our attention has not been called to any prior decision justifying its position. Nor has the Whitbeck Case been approved in this court, although cited and distinguished in Argotsinger v. Vines, 82 N. Y. 309. While the rule is, undoubtedly, as stated by the learned judge in the Whitbeck Case, that a recovery may be had for the value of the thing destroyed, where it has a value which may be accurately measured without reference to the soil in which it stands, he apparently overlooked the fact that fruit-trees do not have such a value; and the rule was, therefore, as we think, wrongly applied. Cases are not wanting to illustrate a proper application of that rule. Where timber forming part of a forest is fully grown, the value of the trees taken or destroyed can be recovered. In nearly all jurisdictions, this is all that may be recovered; and the reason assigned for it is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. 3 Suth. Dam. p. 374; 3 Sedg. Dam. (8th Ed.) p. 45; Single v. Schneider, 30 Wis. 570; Webster v. Moe, 35 Wis. 75; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830; Haseltine v. Mosher, 51 Wis. 443, 8 N. W. 273; Tuttle v. Wilson, 52 Wis. 643, 9 N. W. 822; Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398; Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. 392; Ward v. Railroad Co., 13 Nev. 44; Tilden v. Johnson, 52 Vt. 628; Adams v. Blodgett, 47 N. H. 219; Cushing v. Longfellow, 26 Me. 306. In this state it is settled that even where full-grown timber is cut or destroyed the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 N. Y. 36; Easterbrook v. Railroad Co., 51 Barb. 94. The rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. 3 Sedg. Dam. (8th Ed.) p. 48; Birket v. Williams, 30 Ill. App. 451. Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages, where it has a value after removal, and the land has sustained no injury because of it. 3 Sedg. Dam. (8th Ed.) p. 48; 3 Suth. Dam. p. 374; 5 Am. & Eng. Enc. Law, p. 36, note 2; Stockbridge Iron Co. v. Cone Iron-Works, 102 Mass. 80; Coal Co. v. Rogers, 108 Pa. St. 147–152; Dougherty v. Chesnutt 86 Tenn. 1, 5 S. W. 444; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, 479–488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell, 3 Q. B. 278; Martin v. Porter, 5 Mees. & W. 351. On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land. This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibberd, 6 Cal. 163; Wallace v. Goodall, 18 N. H. 439–456; Hayes v. Railroad Co., 45 Minn. 17–20, 47 N. W. 260. In Wallace's Case, supra, the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil." The same rule prevails as to shade-trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell (Sup.) 5 N. Y. Supp. 248, and cases cited supra. The current of authority is to the effect that fruit-trees and ornamental or growing trees are subject to the same rule. Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Mitchell v. Billingsley, 17 Ala. 391–393; Wallace v. Goodall, 18 N. H. 439–456; 3 Sedgw. Dam. (8th Ed.) § 933.

It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. 144; Striegel v. Moore, 55 Iowa, 88, 7 N. W. 413; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 490. A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part,—as indeed he should not have been, as such value was little or nothing,—so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed. All concur, except BRADLEY, BROWN, and LANDON, JJ., dissenting.

Judgment reversed.

BEEDE v. LAMPREY.

(15 Atl. 133, 64 N. H. 510.)

Supreme Court of New Hampshire. Belknap. July 19, 1888.

Trover for 200 spruce logs. The defendant was defaulted, with the right to be heard as to the assessment of damages. Facts found by the court. The parties own adjoining timber lots in Moultonborough. The defendant, while engaged in an operation on his own lot, negligently, but without malice, cut over the line dividing the lots, and cut down, trimmed, hauled to, and deposited in the lake at Melvin village, in Tuftonborough, and thence towed to his saw-mill, the trees in question, which facts constitute the cause of action. The question whether the measure of damages is the value of the stumpage, or the value of the logs when cut and trimmed, or when deposited in the lake, or when delivered at the mill, was reserved.

E. A. & C. B. Hibbard, for plaintiff. Jewell & Stone, for defendant.

ALLEN, J. The claim of the plaintiff to recover as damages the value of the logs at the mill, which includes the value added by cutting and transporting them, is founded upon his title and right of possession of the property there, and his right to treat it as converted at any time between its severance from the realty and the commencement of the action. The plaintiff had the title to the logs and the right of possessing them at the mill. Whenever and wherever they may have been converted, the conversion did not change the title so long as the property retained its identity. The title could be changed only by a suit for damages with judgment, and satisfaction of that judgment. Smith v. Smith, 50 N. H. 212, 219; Dearth v. Spencer, 52 N. H. 213. The plaintiff might have recovered the logs themselves at the mill, or wherever he could have found them, and so availed himself of their value there, by replevin, or by any form of action in which the property in specie, and not pecuniary damages, are sought. But in such a case, if the claimant makes a title, no question of damages or compensation for loss arises. He recovers his own in the form and at the time and place in which he finds it. In trespass quare clausum, with an averment of taking and carrying away trees, the plaintiff may recover for the whole injury to the land, including the damage for prematurely cutting the trees, and for the loss of the trees themselves, but nothing for the value added by the labor of cutting and transporting them. Wallace v. Goodall, 18 N. H. 456; Foote v. Merrill, 54 N. H. 490. Trover cannot be maintained for any injury to the realty, but only for the conversion of chattels; and in this case the plaintiff is limited in his recovery to the loss of the trees; that is, his loss by the defendant's converting them by their severance from the land. The usual rule of damages in actions of trover is compensation to the owner for the loss of his property occasioned by its conversion; and where the conversion is complete, and results in an entire appropriation of the property by the wrong-doer, the loss is generally measured by the value of the property converted with interest to the time of trial. Hovey v. Grant, 52 N. H. 569; Gove v. Watson, 61 N. H. 136. The defendant converted the logs by cutting and severing the trees from the land, and, the conversion being complete by that wrongful act, their value there represents the plaintiff's loss. His loss is no greater by reason of the value added by the labor of cutting and transportation to the mill. It does not appear that the logs were of special or exceptional value to the plaintiff upon the land from which they were taken, nor that he had a special use for them other than obtaining their value by a sale, nor that the market price had risen after their conversion. If, in estimating the damages, the value at the mill, increased by the cost of cutting and transportation, is to be taken as the criterion, the plaintiff will receive more than compensation for his loss. With such a rule of damages, if, besides the defendant, another trespasser had cut logs of an equal amount upon the same lot, and had hauled them to the lake shore, and a third had simply cut and severed the trees from the land, and sold them there, and suits for their conversion had been brought against each one, the sums recovered would differ by the cost of transporting the logs to the place of the alleged conversion, while the loss to the plaintiff would be the same in each of the three cases. The injustice of such an application of the rule of damages is apparent from the unequal results. In Foote v. Merrill, supra, which was trespass quare clausum, and for cutting and removing trees, it was decided that the plaintiff could recover for the whole injury to the land, including the value of the trees there, but not any increase in value made by the cost of cutting and taking them away. In the opinion it is said, (Hibbard, J.:) "If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps, in trover, and, possibly, in trespass de bonis asportatis, he may be entitled to the same benefit." This dictum, not being any part of, nor necessary to, the decision of that case, and given in language expressive of doubt, cannot be invoked as a precedent decisive of this case. When trespass de bonis asportatis is coupled with trespass quare clausum, either as a separate count or as an averment in aggravation of damages, as in Foote v. Merrill, the increase in damages by reason of such averment and proof of it is the value of the chattels taken and converted; and in such a case is the same as the whole damages would have been in an action of trespass de bonis. Smith v. Smith, 50 N. H. 212, 219. Had the plaintiff in Foote v. Merrill, sued in trespass for taking and carrying away the trees merely, he would have recovered their value upon the lot at the time of the taking, allowing nothing for the expense of cutting and removing them; and no good reason appears why the same rule of damages should not prevail in trover as in trespass de bonis asportatis. The loss to the plaintiff from the taking and carrying away of his property is, ordinarily, the same as the conversion of it by complete appropriation, and the rule of compensation for the loss gives him the value of his property at the time and place of taking or conversion, and interest from that time for its detention.

The English cases upon the subject give as the rule of damages, when the conversion and appropriation of the property are by an innocent mistake, and bona fide, or where there is a real dispute as to the title, the value of the property in place upon the land, allowing nothing for enhancement of value by labor in its removal and improvement. But when the conversion is by fraud or willful trespass, the full value at time of demand and refusal is given. Martin v. Porter, 5 Mees. & W. 351; Morgan v. Powell, 3 Adol. & E. (N. S.) 278; Wood v. Morewood, Id. 440, note; Wild v. Holt, 9 Mees. & W. 672; In re United Collieries Co., L. R. 15 Eq. 46. The early New York cases give the full value at the time of conversion, including any value added by labor and change in manufacturing. Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 Johns. 168; Babcock v. Gill, 10 Johns. 287; Brown v. Sax, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505. In these cases the conversion is treated as tortious, and the same as if made by willful trespass. In later cases a distinction is made between a willful taking and conversion, and the rule of just compensation is upheld in case of the conversion of trees at least, and their value upon the land, is given as damages when the conversion does not result from willful trespass. Whitbeck v. Railroad Co., 36 Barb. 644; Spicer v. Waters, 65 Barb. 227. The Illinois decisions make no distinction between cases of willful trespass and those of conversion by mistake or inadvertence, and include in damages all enhancement in value, from any cause, before suit is brought. Robertson v. Jones, 71 Ill. 405; Coal Co. v. Long, 81 Ill. 359; Railroad Co. v. Ogle, 82 Ill. 627. In Maine the increased value added by cutting and removing the timber is not included in the damages, although the conversion be by willful trespass. Cushing v. Longfellow, 26 Me. 306; Moody v. Whitney, 38 Me. 174. And the same rule seems to govern in Massachusetts, (Iron Co. v. Iron-Works, 102 Mass. 80, 86,) and did in Wisconsin (Weymouth v. Railway Co., 17 Wis. 567; Single v. Schneider, 30 Wis. 570) until the legislature of that state, in 1873, enacted a statute providing that the rule of damages, in the case of one wrongfully cutting and converting timber on the land of another, should be the highest market value of the property up to the time of trial, in whatever state it might be put. Webster v. Moe, 35 Wis. 75; Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755. The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss; that is, the value of the property at the time and place of conversion, with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrong-doer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner or a contemplated special use of the property by him. Forsyth v. Wells, 41 Pa. St. 291; Herdic v. Young, 55 Pa. St. 176; Wooley v. Carter, 7 N. J. Law, 85; Coal Co. v. McMillan, 49 Md. 549; Coal Co. v. Cox, 39 Md. 1; Bennett v. Thompson, 13 Ired. 146; Railway Co. v. Hutchins, 32 Ohio St. 571; Wetherbee v. Green, 22 Mich. 311; Winchester v. Craig, 33 Mich. 205; Nesbitt v. Lumber Co., 21 Minn. 491; Ellis v. Wire, 33 Ind. 127; Ward v. Wood Co., 13 Nev. 44; Waters v. Stevenson, Id. 177; Goller v. Fett, 30 Cal. 481; Gray v. Parker, 38 Mo. 160, 166; Wooden Ware Co. v. U. S., 106 U. S. 432, 434, 1 Sup. Ct. 398; Sedgw. Dam. (5th Ed.) 571, 572; Cooley, Torts, 457, 458, note. In cases of conversion by willful act or by fraud, the value added by the wrong-doer, after conversion, is sometimes given as exemplary or vindictive damages, or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages. The contention of the plaintiff that he is entitled to recover the value of the logs increased by the expense of cutting and removal to the mill in Wolfborough, because, as the case finds, the defendant's acts constituting the conversion were negligent, cannot be sustained on any ground warranting vindictive damages. The cutting and taking the logs was not willful trespass; nor does it appear that the defendant's want of reasonable care amounted to a fraud. No malice is shown, nor were there other facts of outrage upon which such damages could be predicated. No part of the damages in dispute is found as exemplary, and the plaintiff cannot be permitted to assign as damages to his feelings a mere value added to the property by the defendant after the completion of the tort, nor take as a benefit that which is outside of compensation for the wrong. Fay v. Parker, 53 N. H. 342; Bixby v. Dunlap, 56 N. H. 456; Kimball v. Holmes, 60 N. H. 163. The damages must be according to the usual rule in trover, which is the value of the property at the time of conversion, and interest after. The severance of the trees from the land, and their conversion from real to personal property, was in law a conversion of the property to the defendant's use. The value of the trees, immediately upon their becoming chattels,—that is, as soon as felled,—which is found to be $1.50 per thousand feet, with interest from that time, the plaintiff is entitled to recover. Judgment for the plaintiff.

SMITH, J., did not sit. The others concurred.

GASKINS v. DAVIS.

(20 S. E. 188, 115 N. C. 85.)

Supreme Court of North Carolina. Oct. 16, 1894.

Appeal from superior court, Craven county; Bynum, Judge.

Action of trespass by Patsy Ann Gaskins against Henry C. Davis. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

W. W. Clark, for appellant. F. M. Simmons and P. M. Pearsall, for appellee.

AVERY, J. The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away, and converting to his own use valuable timber that was growing thereon, to her damage $500. The logs, after being severed, were transported to Newbern in two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of $112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff; and though the counterclaim may be a defective statement of the defendant's cause of action, in that it fails to aver an unlawful taking, the defect is cured, if the counterclaim can be maintained at all, by the reply, which, by way of aider, raises the question of the rightfulness of the seizure. The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel (Bennett v. Thompson, 13 Ired. 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. Potter v. Mardre, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." In Potter v. Mardre, supra, Rodman, J., delivering the opinion of the court, says: "The principle of equity [applied in that case] is supported by the analogy of the rule established in this state by the decisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. Albea v. Griffin, 2 Dev. & B. Eq. 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz. by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass,—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. Potter v. Mardre, supra; 5 Am. & Eng. Enc. Law, p. 36; Ross v. Scott, 15 Lea, 479. The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the cost of severance. Coal Co. v. McMillan, 49 Md. 549. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks, and used to construct a boat, the plaintiff would not have been entitled to recover the boat, or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any, done to his land in removing it therefrom; but the present plaintiff would have been entitled "to deduct, by way of counterclaim, the value of the timber which was manufactured into the boat, just after it was felled and converted into a chattel." Potter v. Mardre, supra. It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of betterments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In Ross v. Scott, supra, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal in situ, subject to reduction by an allowance for permanent improvements put upon the land. See, also, In re United Merthyr Collieries Co., L. R. 15 Eq. 46; Hilton v. Woods, L. R. 4 Eq. 432; Forsyth v. Wells, 41 Pa. St. 291. The weight of authority, it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden v. Johnson, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; Herdic v. Young, 55 Pa. St. 176; Hill v. Canfield, 56 Pa. St. 454; Moody v. Whitney, 38 Me. 174; Cushing v. Longfellow, 26 Me. 306; Goller v. Fett, 30 Cal. 482; Foote v. Merrill, 54 N. H. 496; Railway Co. v. Hutchins, 32 Ohio St. 571. In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this state that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In Weymouth v. Railroad Co., 17 Wis. 550, the court say: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrongdoer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrongdoer shall lose." Id., 26 Am. Rep. 529, note. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant, for which an action would lie. It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff. The defendant could not recover, therefore, either in a distinct action for the taking of the logs, or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot the property in them in their altered state, and at the new situs, revested in her, with the absolute jus disponendi, as in the case of her other personal property. Nothing remained to be adjusted in the courts, except her claim for damages for the taking of the other lot and the injury to the land, if any, incident to the removal of both lots. It was error, therefore, to instruct the jury that the enhanced value imparted by removal to the one lot of logs might be allowed the defendant as a counterclaim, so as to set off the damages assessed for injury to the land and for the value at the stump of the other lot, and the plaintiff is entitled to a new trial.

New trial.

OMAHA & GRANT SMELTING & REFINING CO. et al. v. TABOR et al.

(21 Pac. 925, 13 Colo. 41.)

Supreme Court of Colorado. May 28, 1889.

Commissioners' decision. Appeal from district court, Lake county.

Two suits, in the nature of actions in trover, brought by Horace A. W. Tabor, David H. Moffatt, Jacob J. B. Du Bois, James G. Blaine, and Jerome B. Chaffee,—the first, against Eddy, James, and Grant; the second, against the Omaha & Grant Smelting & Refining Company, in which it appears the business of the former defendants was merged. Plaintiffs alleged that they, with Charles E. Rider, were the owners and in the possession of the mine in the county of Lake known as the "Maid of Erin Lode," and as survey "Lot No. 568," and "Mineral Entry No. 384," from the 1st day of January, 1882, until the 11th of October, 1883. That between the 3d of July and the 31st of August, 1883, Thomas Ovens, Stanley G. Wight, and others wrongfully entered upon the property, and mined and took out a large quantity of valuable ore, and sold the same to the defendants, who converted it to their own use; and that the ore so mined, sold, and purchased by the defendants was of the value of $25,000 over and above the cost of mining, raising, hauling, and treating. That about the 9th day of March, 1886, the plaintiff Jerome B. Chaffee died, and David H. Moffatt became executor. That on or about the 20th of November, 1885, Charles E. Rider sold and transferred to David H. Moffatt his cause or causes of action in the premises, and that the defendants mixed and confused the ores of plaintiffs with other ores, destroyed their identity, and sold and converted them into money. Plaintiffs pray judgment for $25,000, and interest. Defendants answer, denying all the allegations in the complaint, except the allegation of sale and assignment by Rider to Moffatt, in regard to which they say they are not informed, and the allegation that defendant had not paid plaintiffs for the ore, which is admitted. For further defense, defendants allege that, at the time of the alleged entry and wrongful taking of ore, Stanley G. Wight, Jervis Joslin, Chester B. Bullock, Loyd Park, A. W. Rucker, and ——— Rucker were the owners and in the possession of the Vanderbilt lode mining claim, which conflicted with and embraced a part of the Maid of Erin claim. That the territory in conflict was in litigation between the respective parties. That several actions at law and equity concerning it were pending and undetermined. That at the dates mentioned in the complaint Wight and others were mining and taking ores from the Vanderbilt claim, and from that part in conflict with the Maid of Erin. That these facts were unknown to defendants; and that the ore so taken, or a part of it, was sold and delivered to the defendant at its smelting works in Leadville, as ore from the Vanderbilt lode, and purchased by defendants in regular course of business. That long after the purchase of the ore by defendants they were informed that the ore was taken from the ground in dispute. Defendants further say, in answer, that some time during August or September, 1883, they did purchase ores belonging to Wight, Rucker, and others which were known as and called "Vanderbilt Ores," which as defendants believe were taken from the Vanderbilt claim, of which the said Wight and others were the owners and claimants, and in possession under claim and color of title. Plaintiffs, in reply, deny that Wight and others were the owners of any part of the Vanderbilt claim in conflict with the Maid of Erin claim; deny that any part of the Vanderbilt claim conflicted; and allege that prior to the date mentioned the government of the United States had sold to the plaintiffs Tabor and Du Bois the Maid of Erin claim, and given a receiver's receipt for the same from the land-office at Leadville; and aver that Ovens and Wight wrongfully went into a portion of the ground described in the complaint while plaintiffs were in possession of it, and mined and carried away the ore, which was the same ore mentioned in defendants' answer; deny that Ovens and Wight had any title to the ground from which ore was taken, and aver that all the possession they had was wrongful and illegal, and temporary, for the purpose of obtaining the ore; that the entry of Ovens and Wight was through a shaft on the Big Chief claim, not owned by either party to the controversy, and that from such shaft they worked over the boundary into plaintiffs' property; deny that defendants did not know that Ovens and Wight were taking the ore from plaintiffs' ground; and aver full notice and knowledge of the fact. The two suits were consolidated for the purpose of the trial. The venue was changed to Lake county; the cause tried before the court and a jury, April 15, 1888; verdict for plaintiffs against Eddy, James, and Grant for $3,990.45, and against the Omaha & Grant Smelting & Refining Company for $14,397.67. There are 61 assignments of error. Of these, 38 are to the ruling of the court in admitting and rejecting testimony; 22 (being those from 39 to 60, both inclusive) are to the rulings of the court in giving and refusing the instructions asked; the 61st and last is to the refusal of the court to grant a new trial. The other facts necessary to a proper understanding of the case necessarily appear in the opinion.

Patterson & Thomas, for appellant. *Wolcott & Vaile*, *J. B. Bissell*, and *L. C. Rockwell*, for appellees.

REED, C., (*after stating the facts as above.*) The first 15 and the 18th errors assigned are to the ruling of the court on the cross-examination of plaintiffs' witness O. H. Harker. Counsel in their argument for appellants say: "The defendants sought to show by cross-examination of the plaintiffs' witnesses that at the time of the commission of the trespasses complained of, the Maid of Erin mine was owned by the Henriett Mining & Smelting Company and J. B. Du Bois, and that the original trespassers were enjoined at the suit of these parties by proper proceedings instituted for that purpose, but they were not permitted to do so." It appears that counsel for appellants (defendants below) upon the trial attempted, on cross-examination of the witness, to show that the plaintiff Du Bois owned one-half of the Maid of Erin property, and the Henriett Company the other half, and that the other plaintiffs were not owners, by showing that the witness had so stated in a legal document signed and verified by him as manager and agent in some former proceeding concerning the property, in which case an injunction was issued to restrain a trespass upon the Maid of Erin claim upon the complaint so signed and verified; but the court would not permit it to be done. An examination of the questions asked the witness, which the court did not permit him to answer, will show that none of the testimony sought went to any issue in the case, was not directed to anything in his direct testimony, and was not legitimate cross-examination. Many of the questions were in regard to facts that could only have been proved by production of records or documents. Some of the questions were in regard to suits at law and proceedings where there is nothing in the record to show he in any way participated or of which he had any knowledge; and all the testimony sought, in our view of the case, was immaterial, except in so far as it tended to discredit him or weaken his testimony by showing that his acts or declarations on previous occasions were at variance and inconsistent with his testimony at that time. This counsel had a right to do by introducing the records or documents, and asking him in regard to oral statements. It appears that in the course of the trial the papers executed by the witness, to which his attention was called, were admitted in evidence for the purpose of impeachment,—the only legitimate purpose they could serve.

It is clear that the title of the Henriett Company to one-half of the Maid of Erin claim could not have been established by parol statements, or the acts of an agent in verifying papers where the facts were so stated. Counsel say this was one purpose for which the evidence was sought to be elicited on cross-examination. Had it been proper cross-examination, and directed to an issue, it was incompetent for the declared purposes for which it was sought. The agency of the witness had not been established by any testimony but his own. He stated under oath at the time suit was brought that he was the manager and agent of the Henriett Company. This was insufficient. An agency cannot be established by his own declarations. Harker v. Dement, 9 Gill, 16; James v. Stookey, 1 Wash. C. C. 330.[1] If an agency had been proved, it was that at the time of verifying the papers he was the manager and agent of the Henriett Company; and his sworn statement that he was such agent, and that his principal owned one-half of defendants' claim, could not be binding upon or in any way affect the plaintiffs in this action. And although he was the agent of plaintiffs, in charge of their work in the Maid of Erin, no statement, no matter how solemnly made by him as the agent of the Henriett Company, in favor of such company, or against the title of plaintiffs, could affect either, much less conclude and estop the plaintiffs from asserting the contrary, as is urged by counsel. There was no plea of property in the Henriett Company, and of entry and justification under such a title. The defendant in this case cannot set up a title of a third person in defense, unless he in some manner connects himself with it. Duncan v. Spear, 11 Wend. 54; Weymouth v. Railroad Co., 17 Wis. 555; Harker v. Dement, 9 Gill, 7. It follows that the court did not err in limiting the testimony on the cross-examination to the attempted discrediting of the witness, and in refusing to admit records, except for purposes of impeachment.

It is assigned for error that the court allowed plaintiff Tabor to testify to a conversation with McComb after the latter had been called, and had given his version of it. Counsel put it upon the ground that a party cannot be allowed to contradict or impeach his own witness. It does not appear that Tabor was called for any such purpose, or that his testimony had that effect. He was called to give his version of what occurred at that interview with McComb. A careful comparison of the testimony of both shows that of Tabor more corroborative of than contradictory to that of McComb,—at least, as to the result of such conversation,—although there is some discrepancy in regard to the language used. "The party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony." 1 Greenl. Ev. § 443.

Appellants' counsel rely upon the conversation of Tabor with McComb as a license or consent on the part of Tabor to the entry and taking of the ores from the Maid of Erin ground, and contend that his license or consent as a co-owner to the extent of one-sixteenth of the Maid of Erin ground was conclusive upon himself, and also upon his co-owners of the other fifteen-sixteenths, and was equivalent to a license or consent from all, to the extent of covering the entire property. A license or consent cannot be extended by inference as a consent to enter property not spoken of or referred to in the conversation, and we can find nothing in the testimony of either McComb or Tabor in regard to entering and taking ore from the Maid of Erin ground. It was not attempted to be shown that Ovens, Wight, and Rucker entered under license or consent from Tabor. At the conversation both testify that Tabor was informed the parties had entered under an order from the court, against which he was powerless for the time. It further appears that those parties were in at the time McComb and Tabor had the conversation, and McComb only asked consent to join them. It cannot be contended that such a consent was a license to Ovens, Wight, and Rucker to enter. The testimony went to the jury, and in the eighth and ninth instructions given on prayer of plaintiffs they were instructed, in effect, that they could not limit or reduce the amount to be recovered by reason of the supposed license or consent of Tabor, unless they should find that there was a consent on his part that they should enter through the Big Chief shaft, and take the ore from the Maid of Erin claim; and the same proposition is submitted in the instruction given on behalf of defendants in place of No. 7, refused. These instructions on that point, we think, were correct, and fairly submitted to the jury the question of license or consent. And it is evident from the verdict that the jury found against any such license or consent; and, the jury having so found, it would seem unnecessary to determine whether the instructions were correct or otherwise in regard to the extent such consent, if found, should affect or modify the amount; or, in other words, whether it should cover the whole taking of ore, or be confined to the one-sixteenth owned by Tabor. The jury having found no consent or license on the part of Tabor, defendants could not be prejudiced by the instructions of the court in regard to its effect, if it were found.

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[1] Fed. Cas. No. 7,184.

The question is quite different from what it would be if it related to a transaction in the ordinary course of business relative to the joint property of tenants in common. Here it is attempted to justify a tort, and the injury to the entire property by the supposed license of one joint owner. If the entry had been made by Tabor in person, and the wrongs attempted to be justified under permission from, had been done by, him, his co-tenants could have had against him the same actions at law for injuries to their interests that all are attempting to enforce against parties having no interest. It is held "an action on the case sounding in tort may be maintained by one tenant in common against his co-tenant for a misuse of the common property, though not amounting to a total destruction of it." McLellan v. Jenness, 43 Vt. 183; Agnew v. Johnson, 17 Pa. St. 373; Lowe v. Miller, 3 Grat. 205. And, if one tenant in common assume to own and sell the thing held in common, the other may maintain an action of trover against him. Burbank v. Crooker, 7 Gray, 159; Wheeler v. Wheeler, 33 Me. 347; Coursin's Appeal, 79 Pa. St. 220; White v. Osborn, 21 Wend. 72; Smyth v. Tankersley, 20 Ala. 212. The authority of the tenant in common could not be extended to cover acts of others that he could not legally have done himself. Hence the court was correct in holding and instructing the jury that the consent or license of Tabor, if such were found, could only extend to the interest owned by him in the common property.

Appellants further assign for error the ruling of the court in admitting the testimony of Tabor when called by the plaintiffs to show that, by a parol agreement made at the time of the conveyance of the different interests by Tabor, Moffatt, and Chaffee in the Henriett Company, possession of the property conveyed was to remain in the grantors until the purchase price was paid; that it never was paid; and possession under the conveyance never delivered. A part of such testimony—that which went to show that possession was to be retained—was inadmissible. "All conveyances of real estate and of any interest therein duly executed and delivered shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein specified." Gen. St. c. 18, § 9; Drake v. Root, 2 Colo. 685. Under the statute, it is certainly required that the intention to postpone the operation of a deed shall be declared in the instrument, and it cannot be proved by parol. It follows that the instructions of the court on this point were in part erroneous; that part of the testimony going to prove that possession of the property was never delivered, and remained in the grantors, was clearly competent and proper; and the instructions of the court were proper on that point.

The admission in evidence of the deeds of reconveyance by the Henriett Mining Company and the assignment of Rider of his cause of action was not erroneous, and should be sustained,—the former investing plaintiffs with full title before the commencement of suit; and of the validity of the latter, so as to enable Moffatt, assignee, to succeed to all the rights of his assignor. there can be no question under our statute. Had defendants, by proper and competent testimony, attempted to prove the ownership of one-half of the Maid of Erin claim in the Henriett Company, it would have been inadmissible. There was no attemped justification of entry of Wight and others under the Henriett title of one-half. Under a plea that the close upon which the alleged trespass was committed was not at that time the close of the plaintiff, the defendant may show lawful right to the possession of the close in a third person, under whom he claims to have acted. Jones v. Chapman, 2 Exch. 803. But a bare tort-feasor cannot set up in defense the title of a third person between whom and himself there is no privity of connection. Branch v. Doane, 18 Conn. 233. In justifying under a third person, the defendant must show both the title and the possession of that person, (Chambers

v. Donaldson, 11 East, 65; Merrill v. Burbank, 23 Me. 538; Reed v. Price, 30 Mo. 442,) and that the acts were done by that person's authority. (Dunlap v. Glidden, 31 Me. 510.) A defendant can only justify upon the ground of a better right or title than the plaintiffs have. And it has been held that mere naked possession, however acquired, is good as against a person having no right to the possession. Knapp v. Winchester, 11 Vt. 351; Haslem v. Lockwood, 37 Conn. 500; Cook v. Patterson, 35 Ala. 102. It will be apparent that in the judgment of this court the effort of defendants to set up title to half of the property in the Maid of Erin claim in the Henriett Company, without a plea to that effect, and attempting to show privity or attempting to justify under it, was unwarranted in law, and that no testimony should have been taken in support of any such attempted defense.

Another defense interposed, which seems incompatible with the former, was that certain parties, named in the answer, were the owners of the Vanderbilt claim, and that such claim conflicted with and comprised a part of the Maid of Erin claim, and that the claim was in the possession of the owners named under claim and color of title; and that the ground from which the ore was taken was in conflict between the owners of the claim, and that divers suits in regard to the same were pending and undetermined; that Wight and others, while engaged in mining the Vanderbilt claim, took the ores from the ground in controversy, which defendants bought as Vanderbilt ore; and that the same was taken by the owners of such claim while the *locus* was in their possession under color of title. It is shown in evidence that there were two entries on the property in controversy,—the first by Wight, one of the owners of the Big Chief in 1882, after the Maid of Erin had a receiver's receipt from the United States land-office, when a drift was run from the Big Chief shaft for the Maid of Erin, and was run over the line 20 or 28 feet, into the Maid of Erin ground. The second entry was by the same party and others, in the same way, and upon the same ground. Neither entry was made by extending the work of the Vanderbilt claim to its exterior limits, and thus entering the Maid of Erin property. The party entering and participating in the proceeds of the ores mined were not the owners of the Vanderbilt, but seems to have been one made up for the occasion,—part of the owners of the Vanderbilt, some of the owners of the Big Chief, and, perhaps, parties owning in neither. The plaintiffs pleaded title to the Maid of Erin claim from the government of the United States, and put in evidence a receiver's receipt for the purchase of the property, of date November 23, 1881, and a patent from the United States government dated March 17, 1884. It has been frequently held that a patent for land emanating from the government of the United States is the highest evidence of title, and in courts of law is evidence of the true performance of every prerequisite to its issuance, and cannot be questioned either in courts of law or equity, except upon ground of fraud or mistake, and, if not assailed for fraud or mistake, is conclusive evidence of title. On the 23d of November, 1881, the government parted with its title to the Maid of Erin property, sold it to Tabor and Du Bois, and gave a receipt. The government could thereafter no more dispose of the land than if a patent had been issued. "The final certificate obtained on the payment of the money is as binding on the government as the patent. * * * When the patent issues it relates back to the entry. * * *" Astrom v. Hammond, 3 McLean, 107;[2] Blachley v. Coles, 6 Colo. 350; Poire v. Wells, Id. 406; Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389; Heydenfeldt v. Mining Co., 93 U. S. 634. The patent does not invest the purchaser with any additional property in the land. It only gives him better legal evidence of the title which he first acquired by the certificate. Cavender v. Smith, 5 Clarke, (Iowa,) 189; Id. 3 G. Green, 349; Arnold v. Grimes, 2 Clarke, (Iowa,) 1; Carroll v. Safford, 3 How. 460; Bagnell v. Broderick, 13 Pet. 450; Carman v. Johnson, 29 Mo. 94; Hutchings v. Low, 15 Wall. 88. A patent title cannot be attacked collaterally. "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them." Boggs v. Mining Co., 14 Cal. 362; Leese v. Clark, 18 Cal. 555; Jackson v. Lawton, 10 Johns. 24. An "adverse possession" is defined to be the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under assertion or color of right on the part of the possessor. Wallace v. Duffield, 2 Serg. & R. 527; French v. Pearce, 8 Conn. 440; Smith v. Burtis, 9 Johns. 174. The entry of a stranger, and the taking of rents or profits by him, is not an adverse possession. When two parties are in possession, the law adjudges it to be the possession of the party who has the right. Reading v. Rawsterne, 2 Ld. Raym. 829; Barr v. Gratz, 4 Wheat. 213; Smith v. Burtis, 6 Johns. 218; Stevens v. Hollister, 18 Vt. 294; Brimmer v. Long Wharf, 5 Pick. 131. Possession, to be supported by the law, must be under a claim of right, and adverse possession must be strictly proved. Grube v. Wells, 34 Iowa, 150. The color must arise out of some conveyance purporting to convey title to a tract of land. 3 Washb. Real Prop. 155; Shackleford v. Bailey, 35 Ill. 391.

The title of the Maid of Erin claim was in the government of the United States until divested by its own act. There could be no adverse possession against the government. The claimants of the Vanderbilt claim entered under license only from the government. Admitting, for the purposes of this case, that the entry under the license was legal, that they had complied with the laws of congress and the state, and that their possession extended to and was protected to their exterior lines while the fee remained in the government, when the fee passed from the government to the other party conveying the *locus*, before that time in controversy, the supposed license was revoked, and all acts and declarations of the parties themselves, whether by record or otherwise, as establishing a possessory right, were void as against the grantees of the government, and there could be no entry under color of title, except by some right by conveyance either from the government or its grantees. The fact of the actual possession and occupancy of the Maid of Erin by plaintiffs was not seriously disputed, and the testimony was ample to warrant the jury in finding the fact. The government had granted the land previous to the entry of Wight and others, and that such possession under a legal title was co-extensive with its bounds is so well settled that authorities in its support are unnecessary.

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[2] Fed. Cas. No. 596.

We do not think the court erred in refusing to admit the testimony offered in support of possessory title of the Vanderbilt in the land from which the ore was taken, nor in refusing the testimony in reference to litigation and suits pending between the parties. Neither the title nor right of possession of plaintiffs could be attacked collaterally as attempted, and the testimony offered under the law as shown above was incompetent and inadmissible to prove either adverse possession or color of title. From our view of the law controlling the case, as stated above, it follows that the court did not err in refusing the instructions asked on this point by the defendants, or in giving those which were given. They were substantially correct.

The sale of ore by Wight and others, and purchase by the defendants, was a conversion. A "conversion" is defined to be any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property. Harris v. Saunders, 2 Strob. Eq. 370, note; Webber v. Davis, 44 Me. 147; Gilman v. Hill, 36 N. H. 311; Clark v. Whitaker, 19 Conn. 319. The defendants, by purchasing the ore, acquired no title, and are consequently equally liable for its conversion as the parties who sold it. Clark v. Wells, 45 Vt. 4; Clark v. Rideout, 39 N. H. 238; Carter v. Kingman, 103 Mass. 517. And it was a matter of no importance, so far as the legal liability of defendants was concerned, whether they were ignorant or informed of the true ownership. Morrill v. Moulton, 40 Vt. 242; Johnson v. Powers, Id. 611; Railroad Co. v. Car-Works Co., 32 N. J. Law, 517; Dixon v. Caldwell, 15 Ohio St. 412; Hoffman v. Carow, 22 Wend. 285. The principle *caveat emptor* applies. A person purchasing property of the party in possession, without ascertaining where the true title is, does so at his peril, and, although honestly mistaken, will be liable to the owner for a conversion. Taylor v. Pope, 5 Cold. 413; Gilmore v. Newton, 9 Allen, 171; Spraights v. Hawley, 39 N. Y. 441.

The question of the proper measure of damages is one of much greater difficulty. We can find no conclusive adjudication in our own court. The decisions of the different states are conflicting and irreconcilable. Although, under our Code, different forms of action are abolished, the principles controlling the different actions remain the same as before its adoption. Consequently the law applicable and to be administered in each case depends as much as formerly upon the nature of the case,—the allegations and the distinctive form the case assumes. In many states the courts have attempted in this action to make the rule of damage correspond to that in the action of trespass, and make it in that respect as full and complete a remedy. In the state of New York it was long held, and perhaps still is, that the increased value of the property, added by the labor and acts of defendant, belongs to the rightful owner of the property, and the value of the property in its new and improved state thus becomes the measure of damages, but the doctrine has been questioned and severely criticised in the same state. Brown v. Sax, 7 Cow. 95. In trespass, damage for the whole injury, including diminution in the value of the land by the entry and removal, as well as of the value of the property removed, may be recovered; and the character of the entry, whether willful and malicious, or in good faith, through inadvertence or mistake, is an important element,—an element that cannot enter into the action of trover. In trover, the specific articles cannot be recovered as in replevin. Consequently the same rule as to increased value cannot be applied as in that action, where the specific property can be followed, and, when identified, taken without regard to the form it has assumed. It seems, on principle, therefore, (and this is in harmony with the English authorities and those of many of the states,) that where a party makes his election, and adopts trover, the rule of damage is and should be proper compensation for the property taken and converted, regardless of the manner of entry and taking; and, where the chattel was severed from the realty, regardless of the diminished value of the realty by reason of the taking. In other words, the true rule should be the value of the chattel as such when and where first severed from the realty and becoming a chattel. An examination of the authorities will show that the rule of damages to some extent depends upon the form of action,—whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. This distinction seems well founded in principle and reason. This view of the law is supported by Martin v. Porter, 5 Mees. & W. 352; Wild v. Holt, 9 Mees. & W. 672; Morgan v.

Powell, 3 Q. B. 278; Hilton v. Woods, L. R. 4 Eq. 432; Maye v. Yappen, 23 Cal. 306; Goller v. Fett, 30 Cal. 481; Coleman's Appeal, 62 Pa. St. 252; Cushing v. Longfellow, 26 Me. 306; Forsyth v. Wells, 41 Pa. St. 291; Kier v. Peterson, Id. 357; Moody v. Whitney, 38 Me. 174. We are therefore of the opinion that the rule of damage adopted, and the instructions of the court as to the measure of damage, were erroneous, and that it should have been the value of the ore sold, as shown, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the defendants' place of business. We do not find it necessary to decide whether or not plaintiffs' counsel, by stating in the complaint that the ore taken and converted was of a certain value "over and above the cost of mining, digging, and extracting the same from the ground, raising the same to the surface, hauling the same to the defendants' reduction works, and the cost of treating the same," and defendants taking issue upon it, precluded them from proving and taking greater damage upon the trial; but if it were necessary, for the purpose of determining this case, we should be inclined to so hold. In this action value is a material averment, and the plaintiffs have deliberately asserted one rule, and, issue having been taken upon it, should not be permitted to change base, and adopt upon trial another more disadvantageous to the defendants. In this case it could not have been said the evidence was in support of the allegation or directed to an issue. The testimony should have been directed to the issue, or the pleadings amended.

Counsel for appellees, after obtaining leave from this court, assigned for cross-error the refusal of the court to allow interest on the amount found due from the time of the conversion, and the instruction of the court on that point. It is true, as stated by the learned judge, "that interest in this state is a creature of statute, and regulated thereby; that it is only recoverable in the absence of contract in cases enumerated in the statute; and that damages to property arising from a wrong or negligence of the defendants is not one of the enumerated cases." This could not come under the last clause of the instruction. It is not for damage to property. It is for the wrongful detention of money belonging to plaintiffs. It is clearly distinguishable from Railroad Co. v. Conway, 8 Colo. 1, 5 Pac. Rep. 142, and Hawley v. Barker, 5 Colo. 118. There does not appear to have been any decision in this state directly on the question presented. The same statute has been construed in Illinois (from which state it was taken) as allowing interest in this class of cases from the time of the conversion, and there has been an unbroken line of decisions in that state from Bradley v. Geiselman, 22 Ill. 494, to Railroad Co. v. Cobb, 72 Ill. 148, in which it is said, reviewing the decisions: "The doctrine established by these authorities is, where property has been wrongfully taken or converted into money, and an action of trespass or trover may be maintained, interest may properly be recovered; and this is based upon the statute which authorizes interest when there has been an unreasonable and vexatious delay of payment. There can be no difference between the delay of payment of a money demand and one where property has been wrongfully taken, or taken and converted into money or its equivalent. The two rest upon the same principle." The rule is that when the statute of another state is adopted the construction of the statute in that state is also adopted, and remains the true construction until authoritatively construed by the courts of the state adopting it. The general rule in trover is that the damages should embrace the value of the property at the time of the conversion, with interest up to the time of judgment, and this rule has been followed in almost if not all the states, and seems right on principle. But our statute does not seem to have received the same construction here as in the state of Illinois. While in that state it has been put plainly and squarely as interest under the statute, in our state damage for the detention of the money equal to the legal interest upon the value of the chattels converted from the time of the conversion has been allowed, not as interest, but as damage. Machette v. Wanless, 2 Colo. 170; Hanauer v. Bartels, Id. 514; Tucker v. Parks, 7 Colo. 62, 1 Pac. Rep. 427. We think the court erred in its instructions to the jury on this point. They should have been instructed to add to the amount found as the value of the ore, as further damage, a sum equal to legal interest on the same from the time of the conversion. For the errors in assessing the damage, the case should be reversed, and remanded for a new trial in accordance with the views herein expressed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

Reversed.

E. E. BOLLES WOODEN WARE CO. v. UNITED STATES.

(1 Sup. Ct. 398, 106 U. S. 432.)

Supreme Court of the United States. Dec. 18, 1882.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Samuel D. Hastings, Jr., for plaintiff in error.

Asst. Atty. Gen. Maury, for defendant in error.

MILLER, J. This is a writ of error to the circuit court for the eastern district of Wisconsin, founded on a certificate of division of opinion between the judges holding that court. The facts, as certified, out of which this difference of opinion arose appear in an action in the nature of trover. brought by the United States for the value of 242 cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the state of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wood-Ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth 25 cents per cord, or $60.71 for the whole, and, at the town of Depere, where defendant bought and received it, $3.50 per cord, or $850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations. It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum. We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts that when suit is brought for the value of the coal so taken. and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. Martin v. Porter, 5 Mees. & W. 351; Morgan v. Powell. 3 Adol. & E. (N. S.) 278; Wood v. Morewood, 3 Adol. & E. 440; Hilton v. Woods, L. R. 4 Eq. 438; Jegon v. Vivian, L. R. 6 Ch. App. 760.

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the house of lords, in the case of Livingston v. Coal Co., L. R. 5 App. Cas. 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority, to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

There seems to us to be no doubt that in the case of a willful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. Single v. Schneider, 24 Wis. 299; Weymouth v. Railroad Co., 17 Wis. 567. On the other hand. the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. 505; Baldwin v. Porter, 12 Conn. 484. While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued. It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff. On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser. But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth $850, and he wants to satisfy the claim of the government by the payment of $60. He founds his right to do this, not on the ground that anything he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property, he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Inst. Just. lib. 2, tit. 1, § 34.

After speaking of a painting by one man on the tablet of another, and holding it to be absurd that the work of an Appelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, or any other, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of Nesbitt v. Lumber Co., 21 Minn. 491, is directly in point here. The supreme court of Minnesota says: "The defendant claims that because they [the logs] were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value, that is, that he is not entitled to recover the full value at the time and place of conversion."

That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale. To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses, has been used to screen the lawless depredator who destroys and sells for profit. To hold that when the government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the circuit court is affirmed.

GRIGGS v. DAY et al.

(32 N. E. 612, 136 N. Y. 152.)

Court of Appeals of New York. Nov. 29, 1892.

Appeal from superior court of New York City, general term.

Action by Clark R. Griggs against Melville C. Day and another, as executors of Cornelius K. Garrison, for an accounting for transactions had between plaintiff and said Garrison. From a judgment of a referee both parties appeal. For former reports, see 11 N. Y. Supp. 885, 12 N. Y. Supp. 958, 18 N. Y. Supp. 796, and 19 N. Y. Supp. 1019. Reversed.

Melville C. Day and Esek Cowen, for appellants. John H. Post, for respondent.

EARL, C. J. This action was brought against Cornelius K. Garrison, since deceased, for an accounting. It was referred to a referee, and he ordered judgment in favor of the plaintiff for upwards of $188,000. The record is very voluminous, and in the briefs submitted and the arguments of counsel many questions of law and fact were presented for our consideration. A careful study of the record has satisfied me that the judgment appealed from is both illegal and unjust. In September, 1879, the plaintiff entered into a contract with the Wheeling & Lake Erie Railroad Company, an Ohio corporation, for the construction and equipment of its line of railroad in that state according to the specifications and upon the terms and conditions mentioned in the contract. By one of the provisions of the contract the railroad company was "to furnish the contractor available subscriptions, or proceeds thereof, and aid, to the amount of $4,000 per mile of main track, branches, and sidings, or so much as may be necessary to furnish right of way, grade, bridge, and tie said railroad between Hudson's and Martin's Ferry," a distance of 143 miles, and "to use its best endeavors to secure for the contractor available subscriptions and aid to the extent of $4,000 per mile, or so much as may be necessary," for a similar purpose, as to the balance of the road, a distance of 58 miles. For the performance of this contract, besides the aid to be furnished as above stated, the plaintiff was to receive bonds and stock of the company. He was without financial ability, and he applied to Garrison for financial aid to enable him to perform his contract; and upon his application Garrison, from time to time, advanced him large sums of money, amounting in all, besides interest, to nearly $4,500,000. For the money so advanced the plaintiff assigned and delivered to Garrison as collateral security his construction contract and bonds and stock of the company, and some of it was repaid by the sales to him of bonds and stock. In 1882 the plaintiff received from the company for extra work claimed to have been done by him, and on account of its failure to perform the portions of the contract above quoted, its promissory notes, amounting to $1,949,710.72, and they were delivered by him to Garrison for moneys advanced and to be advanced by him for the construction of the road. Garrison held these notes until May, 1883, when there was due to him for moneys advanced to the plaintiff for the construction of the road nearly $2,500,000. He then received from the company 2,280 of its second mortgage bonds of the denomination of $1,000, at 75 cents on the dollar, amounting, with some interest, to $1,736,600, to apply upon his claims, and he then surrendered to it all of the above-mentioned promissory notes, and they were canceled. On the same day he caused an original entry to be made in his journal,—one of his account books,—as follows: "This amount of notes and interest, $2,062,643.13, taken from contractor at 75 per cent., $1,546,982.35." He then charged the company in his books of account with the whole amount of the notes and interest, and gave it credit for $1,736,600,—the price, including interest, at which he took the second mortgage bonds; and he credited the plaintiff with the sum of $1,546,982.35. The difference between the total amount due upon the notes and the amount allowed by him for the second mortgage bonds was $326,043.13, and thus he had in his hands, not used for the payment of the bonds, the notes to that amount, which he then surrendered to the company without any consideration whatever; and, as the referee found, he elected to look to the company as his debtor on open account for that amount. The referee also found that by reason of the surrender of the notes in consideration of the purchase of the bonds, and by reason of the surrender of the balance of the notes, and by reason of the election before mentioned, Garrison discharged the indebtedness of the plaintiff to him to the amount of the face value of the notes at the time of the surrender. He also found that the plaintiff's rights as pledgor in the construction contract, and in the bonds, stock, and other property transferred to Garrison as collateral security, were never cut off by foreclosure of his rights, or in any other way. These facts having been found by the referee, he found, among other conclusions of law, that the legal effect of the surrender by Garrison to the railroad company of the promissory notes held by him as collateral security for moneys advanced to the plaintiff, and of the charge by him against the railroad company of the full amount of the notes and interest, was to relieve the plaintiff from any liability to him for the amount thereof; and in the accounting he charged Garrison with the full amount of the notes, with interest. The only question which I deem it important now to consider is whether the learned referee was right in making that charge.

The further fact must be taken into consideration that the notes surrendered were of no value as against the company. It was utterly insolvent, with property no more than sufficient to pay its first mortgage bonds. The second mortgage bonds were absolutely of no intrinsic value. The referee held these facts to be immaterial, and that, under the circumstances, Garrison had made himself chargeable with the full amount of the notes, without reference to their value. Such a conclusion is somewhat startling, and should not be sanctioned unless it has support in well-recognized principles of law or authorities which we feel constrained to follow. The entries in Garrison's books of account in reference to these notes have very little bearing upon the controversy between these parties. They were private entries, made by Garrison, undisclosed to the plaintiff, and without his authority. They were important simply as evidence, and are entitled to no more weight than would have been the oral declarations or admissions of Garrison made to any third party. They show what use he made of the notes, and about that there is no dispute. They did not bind the plaintiff, and he has never, so far as appears, assented to them. They show that Garrison intended to take the notes at 75 cents on the dollar, and that he was willing to allow the plaintiff that sum for them. But there was no actual purchase of them. If that entry had come to the knowledge of the plaintiff, and he had adopted it, and so notified Garrison, he could probably have held him to a purchase of the notes for that sum. But he repudiates that entry, and refuses to let Garrison have the notes for that sum. He cannot use that entry to fasten upon him a purchase of the notes at their face value. The minds of the parties never met upon such a contract. Garrison either purchased the notes used in exchange for the bonds at 75 per cent. of their face value, or he did not purchase them at all. Therefore, as the plaintiff repudiates the purchase at the price named, there was no contract of purchase; and as to these notes, pledged for collateral security, Garrison must be held to have wrongfully converted them to his own use. It would make no difference whether we consider these notes as having been exchanged for the bonds, or as having been used in payment for the bonds. In either view, Garrison was, at most, guilty of a conversion of them. As to the balance of the notes, which were surrendered to the company without any consideration, there was simply a wrongful conversion of them. They had no value as obligations against the company, and it is preposterous to suppose that Garrison intended by the surrender to charge himself for their full face value against an indebtedness of the plaintiff to him for money actually loaned. By the surrender he did not intend to release the company from its indebtedness evidenced by the notes, but he intended and elected still to hold the indebtedness, evidenced by his charge in open account upon his books. The obligation of the company was not impaired or lessened by the transaction, and it owed just as much after it as before. Even if he made the notes his own by surrendering them, there was simply a conversion of them. It is true that he elected to hold the company as his debtor upon open account, just as it was his debtor before for the same amount evidenced by the notes. He did not take a new debtor, but he retained and intended to retain the same debtor. Here there was no novation, and nothing resembling it. It usually, if not always, takes three parties to make a novation, and they must all concur upon sufficient consideration in making a new contract to take the place of another contract, and in substituting a new debtor in the place of another debtor. "Novation" is thus briefly defined: "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor." 1 Pars. Cont. 217. Here there was no element answering to this definition. There was no intention to make a novation, no consideration for a new contract, no concurrence of the three or even of the two parties. So we reach the conclusion as to all the notes that Garrison, by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong; and the question is, what were such damages? The answer must be, the value of the notes converted. There can be no other measure, as that measures the entire damage of the plaintiff absolutely. As to the notes surrendered for the bonds, the plaintiff could have elected to take the bonds or their value; but this he refuses to do, as the bonds have no value, and thus he is confined absolutely to the value of the notes.

Now, how does the case stand upon authority? In Garlick v. James, 12 Johns. 146, the plaintiff deposited with the defendant a promissory note of a third person as collateral security for a debt, and the defendant, without the knowledge or consent of the plaintiff, compromised with the maker of the note, and surrendered the note to him upon payment of one half of the face thereof. It was found that the maker was at the time of the compromise abundantly able to pay the full amount of the note, and under such circumstances it was properly held that the pledgee was liable for the balance unpaid upon the note. In Hawks v. Hinchcliff, 17 Barb. 492, the plaintiff sued the defendant upon an account for merchandise delivered, and the defendant showed that the plaintiff took two notes for the amount of the account as collateral security for the payment thereof; that he transferred one of the notes to a person, who recovered judgment thereon against the makers, and afterwards assigned the judgment to one Prindle; that he recovered judgment upon the other note, and assigned that to Prindle; and it appeared that the defendants in those judgments had never paid the notes or the judgments. It was held that the plaintiff, the pledgee, could not recover upon his account. It was not shown upon what consideration the notes and the judgments were transferred by the pledgee, or that at the time of the transfer the makers of the notes were not perfectly solvent. The plaintiff there relied upon the simple fact that the notes and judgments were not paid. Upon this state of the facts the court held that the presumption, nothing appearing to the contrary, was that the note and judgments were transferred by the plaintiff for the full amount appearing to be due upon them, and hence he was charged with the full amount. There are some broad expressions contained in the opinion, which, when isolated from the facts of the case, tend to give some countenance to the plaintiff's contention here. In Vose v. Railroad Co., 50 N. Y. 369, it was held that a wrongful sale by a creditor of collateral securities placed in his hands by the principal debtor does not, per se, discharge even a surety for the debt (much less the principal debtor) in toto, but that by such sale the creditor makes the securities his own to the extent of discharging the surety only to an amount equal to their actual value. In Potter v. Bank, 28 N. Y. 641; Booth v. Powers, 56 N. Y. 22; and Thayer v. Manley, 73 N. Y. 305,—it was held that in an action to recover damages for the conversion of a promissory note the amount appearing to be unpaid thereon at the time of the conversion, with interest, is prima facie the measure of damages, but that the defendant has the right to show in reduction of damages the insolvency or inability of the maker, or any other fact impugning the value of the note. In Bank v. Gordon, 8 N. H. 66, where the bank had received a note as collateral security, and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon compromise, upon proof that the compromise was advantageous, and that the maker was insolvent, and unable to pay the balance; and the general rule was laid down which was announced in the cases last above cited. If the pledgee of the note of an insolvent maker may surrender it upon a compromise for one dollar without being made liable for more than he receives, upon what conceivable principle can a pledgee be held for the face value of a worthless note by surrendering it without any consideration whatever? If one intrusted with a note as agent, or holding it as pledgee, loses it by his carelessness, or even willfully destroys it, he can, in an action against him by the principal or pledgor, be held liable only for the value of the note. If Garrison had broken into the plaintiff's safe and taken these notes without any right whatever, in an action for their conversion the plaintiff could have recovered against him as damages only the actual, not the face, value of the notes. I need go no further. Other illustrations are not needed. Our attention has been called to no case in law or equity which upholds the plaintiff's contention as to these notes. I should be greatly surprised to find any, and do not believe there are any. I have assumed, without a careful examination of the defendants' objections to the notes, that they were valid, and properly issued by the company for their full amount. I have also assumed, without examining the matter, that upon this record we must hold against the contention of the defendants that the second mortgage bonds took the place of the notes given for them, and were held in their stead as collateral security. Statements made upon the argument by the counsel for the appellants render it unnecessary for us to consider any other objections to the judgment, and for the reasons stated the judgment should be reversed, and new trial granted, costs to abide the event. All concur; GRAY, J., in result.

Judgment reversed.

DIMOCK et al. v. UNITED STATES NAT. BANK.

(25 Atl. 926, 55 N. J. Law, 296.)

Court of Errors and Appeals of New Jersey. Feb. 6, 1893.

Error to circuit court, Union county; Van Syckel, Judge.

Action on a note by the United States National Bank against Anthony W. Dimock and others. Plaintiff had judgment, and defendants bring error. Affirmed.

The facts appear in the following statement by DEPUE, J.:

This suit was brought upon a note of which the following is a copy:

"$50,000. New York, April 15, 1884. Four months after date, without grace, we promise to pay to the United States National Bank, or order, at its office in the city of New York, the sum of fifty thousand $^{00}/_{100}$ for value received, with interest at the rate of six per cent. per annum payable; having deposited herewith, and pledged as collateral security to the holder thereof, the following property, viz.: 200 shares Bankers' & Merchants' Tel. stock; 200 shares Missouri Pacific R. R. stock; 200 shares Delaware, Lac. & W. R. R. stock; 15 shares Central Iowa, Ill. Div. 1st bonds,—with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board in the city of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the nonperformance of any of the promises herein contained, without notice of amount claimed to be due, without demand of payment, without advertisement, and without notice of the time and place of sale, each and every of which is hereby expressly waived.

"It is agreed that, in case of depreciation in the market value of the property hereby pledged, (which market value is now $———,) or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon the demand of the holder hereof, so that the said market value shall always be at least ——— per cent. more than the amount unpaid of this note; and that, in case of failure to make such payment, this note shall, at the option of the holder hereof, become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding; and that the holder may immediately reimburse ——— by sale of the said property or any part thereof. In case the net proceeds arising from any sale hereunder shall be less than the amount due hereon, ——— promise to pay to the holder, forthwith after such sale, the amount of such deficiency, with legal interest.

"It is further agreed that any excess in the value of said collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by the holder hereof against ——— now due or to become due, or that may be hereafter contracted; and that, if no other note or claim against ——— is so held, such surplus, after the payment of this note, shall be returned to ——— or ——— assigns.

"It is further agreed that, upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall retain a claim against the maker hereof for any deficiency arising upon such sale. A. W. Dimock & Co."

The other facts appear in the opinion of the court.

Bradbury C. Chetwood, for plaintiff in error. Edward A. & William T. Day, for defendants in error.

DEPUE, J. (after stating the facts). The note on which this suit was brought was in terms made payable in four months after date. It became due August 15, 1884. This suit was brought May 21, 1891. The suit was in all respects regular, and its regularity was in no wise dependent upon that paragraph in the pledge of securities which, upon certain conditions, accelerated the maturity of the note, and made the money payable at a time earlier than that named on its face. The securities pledged for the payment of the note were sold by the plaintiff on the 15th of May, 1884, as the note matured in the following August. From the sale the sum of $45,456.26 was realized, leaving a balance due on the note of $4,456.25; for which the plaintiff claimed judgment. The defendants' contention was that the sale in May was unauthorized, and amounted in law to a conversion. In all other respects the sale was in conformity with the power. On the theory that the sale at the time in question was unauthorized, the defendants contended that they were entitled to have the value of the securities allowed to them at their highest market price between the conversion and the time of the trial. The defendants gave in evidence the fact that in December, 1886, and April and May, 1887, these securities were worth in the market the sum of $56,860, sufficient to pay the plaintiff's note, and leave a balance of $6,860 due the defendants. The defendants' claim was disallowed, and judgment given for the plaintiff for the sum of $4,456.25, being the balance due on the note after crediting on it the proceeds of sale with interest. The case was tried by the judge, a jury being waived. A general exception was taken to his finding. Upon such an exception, if there be evidence to sustain the finding, the exception will not be sustained.

The plaintiff is a national bank, located in the city of New York. The defendants, at the time of these transactions, were bankers and brokers in New York. The debt for which the note was given was a loan of $50,000 to the defendants. The form of the contract pledging securities for the repayment of loans is such as is usual in that city. It must be assumed that the parties were aware of the effect of the terms of such contracts, and with the course of dealing in that market with securities pledged as security for loans.

By the first paragraph in the defendants' contract the plaintiff was authorized to sell the securities at any brokers' board in the city of New York, or at public or private sale in said city or elsewhere, at its option, on the nonperformance of any of the defendants' promises therein contained, without any notice of the time and place of sale. This contract was embodied in and made part of the note itself, and the promise to pay in the note was one of the promises on the nonpayment of which a sale was authorized. The sale was made through a firm of brokers who were members of the stock exchange in New York city. There is no foundation in the evidence for complaint of the manner or fairness with which the sale was conducted.

The power of the plaintiff to sell the securities before the four months named in the note had expired depends upon the construction and effect of the second paragraph of the contract. There was some discussion on the argument as to the right to fill the blanks in that paragraph. The evidence was not sufficient to justify the court in filling the blanks. The contract will be construed in the condition it was in when it was delivered to the plaintiff. In this paragraph it is provided that, in case of a depreciation in the market value of the property pledged, the defendants should, on demand by the holder of the note, make a payment thereon, so that the market value of the securities should always be more than the amount of the debt; and that, in case of the failure of the defendants to make such payment, the note should, at the payee's option, become due forthwith; and that the plaintiff might immediately reimburse itself by the sale of the property or any part thereof; and that in case the net proceeds of such sale should be less than the amount then due on the note, the defendants should forthwith, after such sale, pay the amount of such deficiency, with interest. The power to sell the securities before the maturity of the note, according to its terms, was made to depend upon the concurrence of two conditions,—the depreciation in the market value of the property pledged; and the failure of the defendants, after demand, to make a payment on account of the loan, so that the market value of the securities pledged should be more than the amount due on the note. The proof was that on the 6th of May, 1884, the firm of Grant, Ward & Co. failed, and the Marine Bank closed its doors. On the 14th, the Metropolitan Bank closed its doors, and a number of leading bankers failed. These failures created a panic in the money market, and a great depreciation in the market value of all commercial securities. Early on the morning of the 15th, the defendants' embarrassments led them to an assignment for the benefit of their creditors. It fully appeared that, at the commencement of business hours on the morning of May 15th, the securities pledged had so depreciated that their market value was considerably below the amount of the plaintiff's debt. Under a pledge, with a power of sale such as exists in this case, the pledgee, unless restrained by other conditions in the contract of pledge, has a right to sell whenever the condition of the market makes it prudent for him to do so for the protection of his interests. The other condition was that a demand should be made upon the defendants, and that, upon such demand, the defendants should pay on account of the note a sum sufficient to reduce the amount due below the market value the securities then had. The case shows that, at the beginning of business hours on the morning of the 15th, two notices were served on the defendants. One of these notices was in form signed by the cashier of the bank, in these words: "I hereby call your loan of April 15, 1884, for $50,000." This notice was plainly not a demand in conformity with the condition expressed in the contract. A depreciation in the market value of the securities pledged did not convert the loan, which was made on four months' time, into a call loan. That condition of affairs imposed upon the defendants the obligation not to pay the note in full, but, by a payment upon it, to reduce the loan until the amount remaining due was under the market value of the securities. It appeared in evidence that the other notice served was "a demand for the payment on account of the loan to a degree corresponding to the depreciation of the securities." Neither the original notice nor a copy was produced. The witness who testified upon this subject was not able to state the amount of the depreciation, but he added that such depreciation was known to both the borrower and lender. The object of a demand in a contract of this sort is to give the party an opportunity to comply with the terms of his contract, and preserve his securities from sale before the expiration of the time for which the loan was negotiated; and it would be reasonable that, in making the demand, the party, before he is put in default, should have been made aware of the extent of the depreciation, approximately at least, and the sum required to be paid to save his rights should be specified. If the case rested solely on the sufficiency of the demand made, I should have some hesitation in sustaining this judgment.

Assuming that the sale of the securities in

May was unauthorized, it was a conversion of the property, though the sale was made in good faith. Nevertheless, the judge's finding, and the rule of damages applied, were correct. The general rule is that the measure of damages for conversion is the value of the property at the time of the conversion. This rule has been modified with respect to the conversion of stocks and bonds, commercial securities vendible in the market, the market value of which is liable to frequent and great fluctuations, caused by the depression and inflation of prices in the market. In Markham v. Jaudon, 41 N. Y. 235, the court of appeals held that as between a customer and his broker, holding stock purchased for the former which had been pledged as security for advances made in the purchase, the measure of damages for the conversion by an unauthorized sale was the highest market price between the time of the conversion and the trial. Relying upon this case, the defendants put in evidence no proof of value except the market value in December, 1886, and April and May, 1887. But Markham v. Jaudon has been overruled by a series of cases in the New York courts, and the rule adopted that in such cases the principal may disaffirm the sale, and that the advance in the market price from the time of sale up to a reasonable time to replace it after notice of the sale was the proper measure of damages. Baker v. Drake, 53 N. Y. 211, 66 N. Y. 518; Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368. These decisions were made in cases where the transactions were dealings between the customer and broker in the purchase and sale of stocks on a margin. Subsequently the same rule was applied where the owner of stock for which he had paid full value, and which he held as an investment, put it in the hands of a broker as collateral security for the debt of a third person, upon condition that it should not be sold for six months, the stock having been sold without the owner's authority before the expiration of that time. Under the decisions of the New York courts, reasonable time, where the facts are undisputed, is a question of law for the court. Wright v. Bank, 110 N. Y. 238, 18 N. E. 79. In Colt v. Owens, 90 N. Y. 368, 30 days after the sale and notice of it was regarded as reasonable time. The rule of the highest intermediate value between the time of the conversion and the time of the trial has been rejected in the supreme court of the United States as the proper measure of damages, and the rule that the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it was adopted as the correct view of the law; for the reason, as expressed by Mr. Justice Bradley, that more transactions of this kind arise in the state of New York than in all other parts of the country, and that the New York rule, as finally settled by its court of appeals, has the most reason in its favor. Galigher v. Jones, 129 U. S. 194, 9 Sup. Ct. 335. The principle upon which this doctrine rests is the consideration that the general rule that in an action for a conversion the market value of the property at the time of the conversion would afford an inadequate remedy, or rather no remedy at all, for the real injury, which consisted in the wrongful sale of property of a fluctuating value at an unfavorable time, chosen by the broker himself; hence the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damges. As was said by Mr. Justice Bradley in Galigher v. Jones: "A reasonable time after the wrongful act complained of is to be allowed to the party injured to place himself in the position he would have been in had not his rights been invaded." The general rule that the market value at the time of the conversion is the measure of damages being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be attained. In England the market value at the time of the trial appears to be the measure of damages. Owen v. Routh, 14 C. B. 327. In some of the sister states the rule of the highest intermediate price before the trial has been adopted. In New York, and in most of the sister states, as well as in the supreme court of the United States, the formula which has been called the "New York Rule" has been adopted, and is the rule which will accomplish the most complete justice in the ordinary transactions between the broker and his customer dealing in stocks when an unauthorized sale is the act of conversion. In such cases the customer has a choice of remedies. He may claim the benefit of the sale, and take the proceeds; he may require the broker to replace the stock, or replace it himself, and charge the broker for the loss; or he may recover the advance in the market price up to a reasonable time within which to replace it after notice of the sale. Cook, Stock & S. 460. But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day, another element enters into the consideration of the compensation to be awarded to the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment it is the duty of the pledgee to keep the securities in hand at all times ready to be delivered to the pledgor on the payment of the debt. Cook, Stock & S. 469–471. An unauthorized sale before the debt matures is a conversion, for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated, and the market with a downward tendency. The market may revive, and prices be enhanced before the debt matures. Under such circumstances, a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt, and recover as damages the market value of the securities as of that time, would commend itself in reason and justice. As applied to the facts of this case, this rule would be eminently just. The plaintiff in good faith sold the securities in the manner authorized by the contract of pledge. The breach of duty was in selling at an unauthorized time. The debt was not paid or tendered at maturity; and if the plaintiff had held the stock, and sold it at that time, the sale would have been strictly in conformity with the power. If the defendants lost anything by the sale at a time unauthorized, they would be recompensed for that loss by an award of damages equivalent to the market value of the securities at the time the debt became due. Tested by either of these standards, the proper credit was allowed, the proof being that the prices of the securities were less when the note matured than when the securities were sold. No evidence of an increased price prior to December, 1886, was produced.

The finding of the judge should be affirmed on the ground, also, that the sale was consented to and ratified by the defendants. The notices served on the morning of May 15th informed the defendants that the securities pledged had, in the plaintiff's estimation, depreciated in market value, and that the contingency provided for in this part of the contract had happened, and also plainly indicated the purpose on the part of the plaintiff to avail itself of the right which, under those circumstances, would accrue under the contract. Immediately after the sale was made, the defendants had notice of the fact of sale, and, very shortly after, of the amount realized therefrom. No objection was made to the sale or the amount realized. On the 4th of June, 1884, the defendants filed a schedule of their indebtedness under their assignment. This schedule was verified by the oaths of the defendants that it contained a true account of their creditors, and of the sum owing to each, and also a statement of any existing collateral or other security for the payment of such debt. In this statement the plaintiff was put down as a creditor for the sum of $4,737.50, which was about the amount due the plaintiff after the proceeds were applied to the debt; and to this specification of the existing debt due the plaintiff was appended a statement that for the payment of this debt there was no existing collateral or other security. In September, 1885, the defendants caused to be presented to the plaintiff a composition agreement with a view to a compromise with their creditors, in which the debt due the plaintiff was stated to be the sum of $5,118.87, figures which represented approximately the net amount due the plaintiff on the note after applying thereon the proceeds of the sale of the securities, with interest. This agreement was signed by the plaintiff, but the project fell through, the defendants being unable to effect a compromise with all their creditors. The defendants had the election either to ratify the sale, and claim the benefit of it, or repudiate it, and hold the plaintiff in damages. The act of the defendants in applying the proceeds of the sale as a credit on the plaintiff's note is so positive and emphatic an act of ratification and adoption that it cannot be retracted. The case was properly decided at the trial, and the judgment should be affirmed.

ELLIS v. HILTON.

(43 N. W. 1048, 78 Mich. 150.)

Supreme Court of Michigan. Nov. 15, 1889.

Error to circuit court, Grand Traverse county; RAMSDELL, Judge.

Pratt & Davis, for appellant. Lorin Roberts (J. R. Adsit, of counsel), for appellee

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him $35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance that he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this $35 in care and medical treatment. He is the loser of the actual value of the horse. and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in Watson v. Bridge, 14 Me. 201, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In Murphy v. McGraw, 41 N. W. Rep. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice. The judgment of the court below must be reversed, with costs, and a new trial ordered.

CHAMPLIN and MORSE, JJ., concurred with LONG, J.

SHERWOOD, C. J. I concur in the result.

CAMPBELL, J. I think the rule laid down at the circuit the proper one.

SILSBURY v. McCOON et al.[1]

(3 N. Y. 379.)

Court of Appeals of New York. July, 1850.

This was an action of trover for a quantity of whisky. On the first trial before Willard, circuit judge, at the Montgomery circuit, in May, 1843, the plaintiffs were nonsuited. The supreme court on bill of exceptions set aside the nonsuit, and ordered a new trial. See 6 Hill, 425. The case was again tried in November, 1844, before the same judge. On that trial it was proved that one Hackney, a deputy of the sheriff of Montgomery county, on the 22d of March, 1842, by virtue of a fieri facias issued on a judgment in the supreme court in favor of McCoon and Sherman, the defendants, against Uriah Wood, sold the whisky in question, being about twelve hundred gallons, having made a previous levy thereon; and that upon the sale the defendants became the purchasers, and afterward converted it to their own use. The whisky was levied on and sold at the distillery of the plaintiffs, who forbade the sale.

The plaintiffs having rested, the defendants offered to prove, in their defense, that the whisky was manufactured from corn belonging to Wood, the defendant in the execution; that the plaintiffs had taken the corn and manufactured it into whisky without any authority from Wood, and knowing at the time they took the corn that it belonged to him. The plaintiffs' counsel objected to this evidence, insisting that Wood's title to the corn was extinguished by its conversion into whisky. The circuit judge sustained the objection and refused to receive the evidence. The defendants' counsel excepted. The plaintiffs had a verdict for the value of the whisky, which the supreme court refused to set aside. See 4 Denio, 332. After judgment the defendants brought error to this court, where the cause was first argued by Mr. Hill, for the plaintiffs in error, and Mr. Reynolds, for the defendants in error, in September, 1848. The judges being divided in opinion, a reargument was ordered, which came on in January last.

N. Hill, Jr., for plaintiffs in error. M. T. Reynolds, for defendants in error.

RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if, during its continuance, the wrong-doer enhances the value of the chattels by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to-wit, that if the chattel wrongfully taken afterward come into the hands of an innocent holder who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is, therefore, regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case (Y. B. 5 Hen. VII. p. 15), it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner, because it can not be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Moore, 20), trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is, therefore, no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrong-doer; provided the common law agrees with the civil in the principle applicable to such a case.

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[1] Dissenting opinion of Bronson, C.J., omitted.

The acknowledged principle of the civil law is that a willful wrong-doer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a willful violator of his right of property.

These principles are to be found in the Digest of Justinian. Lib. 10, tit. 4, leg. 12, § 3. "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce the said wine, oil or garments." So in Vinnius' Institutes (title 1, pl. 25): "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his law of Nature and of Nations (b. 4, ch. 7, § 10), and in Wood's Institutes of the Civil Law (page 92), which are cited at large in the opinion of Jewett, J., delivered in this case in the supreme court (4 Denio, 338), and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law (page 240), the writer states the civil law to be that the original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species, however, must be incapable of being restored to its ancient form; and the materials must have been taken in ignorance of their being the property of another.

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a willful and an involuntary wrong-doer hereinbefore mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrong-doér.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his Commentaries (volume 2, p. 404), in stating what the Roman law was, follows Bracton, but neither of these writers intimate that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks' Abridgement, tit. "Property," 23, is the case from the Year Book, 5 H. VII. p. 15 (translated in a note to 4 Denio, 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moor's Reports (page 20), in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterward gave it to the plaintiff, and that the defendant, therefore, took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's Reports (page 38), and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass;

and it was adjudged that the whole should go to the defendant: and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share (Just. Inst. lib. 2, tit. 1, § 28): and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law if A. obtain by fraud the parchment of B. and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B. is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture. Just. Inst. lib. 2, tit. 1, §§ 23, 24. Neither Bracton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principle of the common law, to the original owners without reference to the degree of improvement, or the additional value given to it by the labor of the wrong-doer. Nay more, this rule holds good against an innocent purchaser from the wrong-doer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again: The court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrong-doer in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy: while the rule adopted by the court below leads to the absurdity of treating the willful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article; the owner of the ore may recover its value in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus, the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent, but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In Betts v. Lee, 5 Johns. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees and made them into shingles. The property could neither be identified by inspection nor restored to its original form; but the plaintiff recovered the value of the shingles. So, in Curtis v. Groat, 6 Johns. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a willful trespasser cannot acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries (volume 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property willfully as a trespasser; and that it was settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. Snyder v. Vaux, 2 Rawle, 427. And in Maine and Massachusetts it has been applied to a willful intermixture of goods. Ryder v. Hathaway, 21 Pick. 304, 305; Wingate v. Smith, 7 Shep. 287; Willard v. Rice, 11 Metc. (Mass.) 493.

We are, therefore, of opinion that if the plaintiffs below, in converting the corn into whisky, knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which, although changed from the original material into another of different nature, yet, being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the supreme court should be reversed and a new trial ordered. Judgment reversed.

GARDINER, JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, C. J., and HARRIS, J., dissent.

TAYLOR, J., did not hear the argument, and gave no opinion.

CLEMENT v. DUFFY.

(7 N. W. 85, 54 Iowa, 632.)

Supreme Court of Iowa. Oct. 21, 1880.

Appeal from circuit court, Wright county.

This is an action of replevin for 225 bushels of wheat. The writ was issued on the twenty-sixth day of September, 1879, and the wheat being in stack, the sheriff delivered it to the plaintiff, who proceeded to thresh and market it. Each party claimed to be the absolute owner of the grain. The trial was had on the nineteenth day of November, 1879. A jury was empanelled, and the plaintiff introduced his evidence, whereupon the court, on motion of the defendant, withdrew from the jury the question of ownership and right of possession, and rendered judgment therefor in favor of the defendant. By the agreement of the parties, the question of the assessment of damages and the value of the property was also withdrawn from the jury and submitted to the court.

It was admitted that the wheat in controversy consisted of 225 bushels, and that on the day the same was taken from the defendant, under the writ of replevin, wheat was worth, in the nearest market, 65 cents per bushel; that after the taking and before the day of trial the wheat advanced in value, and the highest value in the nearest market during said interval was one dollar a bushel; that plaintiff sold the same in market at 90 cents a bushel; that the threshing and hauling to market were worth 20 cents a bushel. The defendant offered to prove that wheat of the quality of that in controversy was, at the time of the trial, worth one dollar per bushel in the nearest market. This evidence was objected to, and the objection was sustained, and defendant excepted. No further evidence having been introduced, the court held that the defendant was entitled to recover the value of the wheat at the nearest market on the day the same was taken under the writ of replevin, less the expense of threshing and marketing, without regard to the subsequent advance in value, and without regard to the price actually obtained by plaintiff, and rendered judgment accordingly. Defendant appeals.

S. M. Weaver, for appellant.

ROTHROCK, J. 1. The only question to be determined is the measure of damages which the defendant is entitled to recover. It is claimed that he should receive the highest market price up to the time of the trial. The action of replevin, or for the recovery of specific personal property, as it is denominated in the Code, is a contest for property and not for damages. Where an issue is made in the action, each party claims that he is entitled to the possession of the property. The property is the primary subject of the controversy. Ordinarily the plaintiff executes the bond provided for in section 3229, and the property is delivered to him. The obligation of his bond is "that he will appear at the next term of the court and prosecute his suit to judgment, and return the property if a return be awarded, and also pay all costs and damages that may be adjudged against him."

By section 3238 the jury are required to assess the value of the property, as also the damages for taking or detention thereof. We think, where the plaintiff seizes the property upon his writ, and the defendant succeeds in the action and is found to be the absolute owner of the property, and is therefore entitled to its return, that the value should be assessed as of the time of the trial. Such is the obligation of the bond. The plaintiff thereby undertakes to deliver the property to the defendant in case a return be awarded. If he has in the meantime, by a sale of the property or otherwise, put it out of his power to make the delivery required by the bond, he must render its equivalent as of the time when the delivery should have been made. The case is not different in principle from an ordinary sale of property to be delivered in the future. In this case the grain increased in value pending the action. It is property of that character which fluctuates in value. If it had decreased in value the measure of the defendant's recovery would still be the value at the time of the trial, with damages for the decrease in value, because the defendant, by his bond, undertakes not only to return the property, but also to pay damages; and the jury are, by section 3238, required to assess the damages for the taking or detention.

A large number of authorities have been cited by counsel for appellant upon the question whether, in an action of trover, the plaintiff is entitled to recover the value of the property at the time of the conversion, or the highest value up to the time of the trial. We have examined many cases upon the subject. A full review of the authorities upon the question will be found in a note to the sixth edition of Sedgwick on the Measure of Damages (page 590). Upon the one hand it is held that in actions for the wrongful conversion of stocks and of personal property of fluctuating value the measure of the damages is the highest market price which the property may have had from the date of the conversion to the end of the trial, provided the action be brought and pressed with proper diligence. Other authorities hold that the value must be limited to the date of the actual conversion of the property. It has been held by this court that the measure of damages for the breach of an executory contract for the purchase of goods which are paid for in advance is the highest market price up to the time of the trial. Cannon v. Folsom, 2 Iowa, 101; Davenport v. Wells, 3 Iowa, 242.

But we need not pursue this inquiry, nor determine this question. We think it is clear that, by the very terms of the bond, the plaintiff in this case was bound to account for the grain and for damages for its detention, as of the time at which he was bound to deliver it.

2. It is urged by counsel for appellant that the court erred in deducting from the value of the grain the cost of threshing and marketing; and it is said that where a wrong-doer expends labor upon the property of another, he is not entitled to compensation therefor. But in this case it does not appear that the plaintiff knew, when he commenced the action and seized the grain, that it was the defendant's property. He may have acted in entire good faith, believing that he was the owner. We believe the rule should be limited to wilful wrong-doers. Such seems to have been the opinion of the court in Silsbury v. McCoon, 3 N. Y. 379. The cases where the question has arisen are mostly those where it has been claimed that the right of property may be lost by reason of the change of identity. See 2 Kent. Comm. 363. What is said in Stuart v. Phelps, 39 Iowa, 18, upon the subject, should, we think, be considered as applicable to a wilful trespass. In our opinion the expense of threshing and marketing the grain was properly deducted from the market price. Grain is ordinarily held for sale on the market. In the stack it is of no value as an article of commerce; and the plaintiff did no more than what the defendant would have been required to do to realize the money upon it.

For the error in assessing the value as of the time when the grain was seized under the writ, the judgment must be reversed.

JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSPORTATION & MANUFACTURING CO.[1]

(9 South. 661, 27 Fla. 1.)

Supreme Court of Florida. April 25, 1891.

Appeal from circuit court, Orange county; John D. Broome, Judge.

J. R. Parrott, Robt. W. Davis, Hammond & Jackson, and T. M. Day, Jr., for appellant. Alex. St. Clair-Abrams and Beggs & Palmer, for appellee.

RANEY, C. J. This is an appeal from a judgment recovered against appellant by the appellee in April, 1890, for the sum of $52,909.03 and costs, in an action of trespass.

The amended declaration states that the defendant, who is a corporation under the laws of Florida, on April 9, 1888, owned, controlled, managed, and operated a railroad from the town of Sanford, in Orange county, to Tavares, in Lake county, in this state, known as the "Sanford & Lake Eustis Division of the Jacksonville, Tampa & Key West Railway Company;" and that at the same time, and at the time of the construction of the said Sanford & Lake Eustis road, the plaintiff, a body corporate under the laws of this state, was the owner of certain buildings in Tavares, to wit: The Peninsular Hotel, of the value of $40,000; a store building on Tavares boulevard, at the corner of New Hampshire avenue, of the value of $6,000; and another store building, on the same boulevard, and near the same avenue, of the value of $2,000; one livery stable, valued at $1,500; one cottage, on East Ruby street, valued at $600; another at the corner of the same street and Joanna avenue, valued at $500; two other cottages on the same avenue, valued, respectively, at $500 and $400; and one on Texas avenue, valued at $400; and that the plaintiff was at the time stated the owner of the following personal property, viz.: The furniture and entire outfit of the hotel, of the value of $16,000; the counters, shelves, cases, etc., in the first-named store, of the value of $1,000; chairs, tables, maps, desks, life-preservers, and harness of the value of $1,000; one outfit of printing material, of the value of $1,200,—the buildings, tenements, and personal property aggregating in value the sum of $72,100. That the railroad was constructed along Tavares boulevard, within 150 feet of plaintiff's stores and hotel, and within 1,000 feet of all the other above-described property; and that defendant, although well aware of the inflammable nature of the material of which the buildings, tenements, and personal property were composed, and of their liability to take fire, negligently and carelessly permitted its locomotive engines, operated and controlled by its agents, servants, and employés to be run along the said boulevard without taking necessary and proper precaution to prevent sparks of fire escaping from the smoke-stack of the locomotive engines, thereby endangering the property of the plaintiff to destruction by fire; and that, on the morning of the day aforesaid, the defendant's train of cars, drawn by one of its locomotive engines, and controlled, managed, and operated by one of its employés, agents, and servants, started from the said boulevard for Sanford, the said locomotive not having a spark-arrester therein, (if there was any spark-arrester at all,) so arranged as to prevent the escape of sparks from the smoke-stack; and the defendant having negligently, recklessly, and carelessly omitted and failed to exercise due care and precaution to prevent the escape of sparks of fire from the smoke-stack of said locomotive engine, and not exercising due care and diligence in managing, controlling, and operating the locomotive, it, the said locomotive, there being at the time of leaving said boulevard, and before, a high wind blowing, threw out from its smoke-stack a considerable number of sparks and blazing fragments of wood, which then and there set fire to a certain wooden sidewalk on said boulevard, and the fire was communicated to the adjacent buildings, including the plaintiff's said buildings, tenements, and personal property, and plaintiff's properties aforesaid were, all and each of them, totally destroyed by said fire; the plaintiff being without fault, and unable to arrest or prevent the spread of the fire, which fire was caused by the gross negligence of defendant in not exercising due care and precaution in preventing the escape of the sparks from the locomotive; the plaintiff claiming $75,000 damages.

* * * * * * *

VII. As to the measure of damages, the following instructions, numbered here as in the record, were given to the jury:

"(21) That the measure of damage in cases of this kind is the value of the property at the time it was destroyed, with interest at the rate of 8 per cent. per annum; that the jury have the right to arrive at this value from the testimony of the witnesses, of the weight and credibility of which they are the sole judges." (117th error assigned.)

"(8) [General charge by the court:] If the jury believe from the evidence that the fire which destroyed plaintiff's property was caused, as laid down in the declaration, by the negligence of the defendant as a proximate cause, and that no negligence of the plaintiff concurred as contributing to the result, the plaintiff is entitled to recover from the defendant the value of the property destroyed at the time and place of its destruction, which value you must arrive at from the evidence, with eight per cent. per annum interest added from the 9th of April, 1888, to this time." (138th error assigned.)

Upon the same question the following instructions were asked for by the defense, and refused to be given by the court, numbered here also, as in the record, to-wit:

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[1] Portion of opinion omitted.

"(28) The court instructs the jury that, should they find from the evidence that the defendant is liable for the burning of plaintiff's property, in estimating the damages for the property destroyed they must be governed by the market value of the property at the time and place it was destroyed." (Its refusal is assigned as the 128th error.)

"(29) That it devolves upon the plaintiff to prove by a preponderance of evidence, the market value of the property destroyed." (Its refusal is assigned as the 129th error.)

"(30) That, should the jury find from the evidence that defendant is liable for the burning of plaintiff's property, in estimating the damages resulting therefrom they are confined to the market value of the property destroyed at the time and place of its destruction, and they are not to be governed alone by the cost of the property to the plaintiff; but they may take into consideration the age of the property destroyed, its deterioration from use, its situation, the quality of its materials, and all other facts given in evidence which bear on the market value of the property at the time and place it was destroyed." (Its refusal is assigned as the 130th error.)

The law as to what is the "measure of damage" in the abstract, in cases where the property of one has been destroyed, unintentionally, but by the negligence or carelessness of another, where there is no element of willfulness or maliciousness in the destruction, is well settled to be "just compensation in money for the property destroyed;" such an amount as will fully restore the loser to the same property status that he occupied before the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is necessarily confined strictly to the ascertainment of the value of the properties destroyed, with such incidents of interest for the retention of such value from the person entitled thereto as may be sanctioned by law. The contention of the appellant in urging as error the giving of the above-quoted instructions by the court on this subject, and the refusal to give the above instructions by it asked for, is that the plaintiff, in establishing the value of his destroyed properties should have been confined to proof of its market value at the time and place of its destruction; and that the admission of evidence as to the original cost of the properties, and as to the depreciation thereof from its original cost by usage or otherwise, was erroneous; and that it was error to instruct the jury that the plaintiff was entitled, as matter of law, to interest, at the rate fixed by law, upon whatsoever amount of damages they might find the plaintiff to be entitled to.

Wherever there is a well-known or fixed market price for any property, the value of which is in controversy, it is proper, in establishing the value, to prove such market value; but, in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor,—an ability, from such demand, to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing,—no ability to sell the same,—then it cannot be said to have a market value "at a time when, and at a place where," there is no market for the same. We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value of the property at the time and place of its destruction, in the absence of proof that at the time and place of such destruction there was a market for such property. In cases where property is of a well-known kind in general use, having a recognized standard value, it is not proper to circumscribe the proof of such value within the limits of the market demand at the time when, and at the place where, it was destroyed. Were the rule contended for to prevail, then the compensation for personal properties, confessedly worth thousands of dollars, would be reduced to a pittance in cents if destroyed en route from market to market, in a thinly-settled, barren country where there was no demand, simply because of the accident of "time and place" of its destruction. In actions of this kind, where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original market cost of the property; the manner in which it has been used; its general condition and quality; the percentage of its depreciation since its purchase or erection, from use, damage, age, decay, or otherwise,—are all elements of proof proper to be submitted to the jury to aid them in ascertaining its value. And to establish value in such cases the opinions of witnesses acquainted with the standard value of such properties are properly admissible. Sullivan v. Lear, 23 Fla. 463, 2 South. 846; Railroad Co. v. Winslow, 66 Ill. 219; 1 Thomp. Trials, § 380; Railroad Co. v. Irvin, 27 Ill. 178; White v. Hermann, 51 Ill. 243; Railroad Co. v. Bunnell, 81 Pa. St. 414; Vandine v. Burpee, 13 Metc. 288. Judge Cooley, in Insurance Co. v. Horton, 28 Mich. 175, in speaking of evidence based on a knowledge of the purchase price of property, says: "The objection that the daughter of the plaintiff was allowed to testify to the value of articles burned, without having been shown to possess the proper knowledge to qualify her to speak as an expert, was not well taken. She testified that she bought a good many of the articles, and was present when others were bought. On this evidence she had some knowledge of values which it was proper she should communicate to the jury. The extent of that knowledge, and its sufficiency as a basis for a verdict, were to be tested by her examination, and by the good sense and judgment of the jurors." Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190; Com. v. Sturtivant, 117 Mass. 122; Derby v. Gallup, 5 Minn. 119, (Gil. 85;) The Slavers, 2 Wall. 375; Johnston v. Warden, 3 Watts, 104; Whipple v. Walpole, 10 N. H. 130; Joy v. Hopkins, 5 Denio, 84. In Norman v. Wells, 17 Wend. 136, the court says: "The ordinary, and in general the only, legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount. They are the only proper judges. They are impartial, and capable of entering into these ordinary matters." In Clark v. Baird, 9 N. Y. 183, Johnson, J., delivering the opinion, says: "Upon this ground, as well as upon that of superior convenience and the constant reception of such testimony upon trials without objection,—a tacit, but strong, proof of its propriety,—it must be deemed established that, upon a question of value, the opinion of a witness who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury." Hamer v. Hathaway, 33 Cal. 117; Rogers v. Insurance Co., 1 Story, 603; Blydenburgh v. Welsh, 1 Baldw. 331; Whitbeck v. Railroad Co., 36 Barb. 644; Luse v. Jones, 39 N. J. Law, 707; Brown v. Werner, 40 Md. 15; Allison v. Chandler, 11 Mich. 542; Railroad Co. v. Marley, 25 Neb. 138, 40 N. W. 948; Browne v. Moore, 32 Mich. 254. We think the evidence as to values admitted in this case were fully confined within the limits of the principles announced, and that there was no error in the admission of such testimony, nor in the giving of the instructions above quoted upon the question of the measure of damages, nor in the refusal to give the above-quoted instructions asked for by the appellant.

* * * * * * *

The amount which it would have cost to erect buildings of the same kind on the day of the fire, less a proper deduction for deterioration, is not the proper measure of damages in a case of this kind. In Burke v. Railroad Co., 7 Heisk. 451, where the plaintiff's dwelling and contents had been destroyed by fire communicated by sparks from the railroad company's locomotive, the jury were instructed that the measure of damages would be just what it would cost in cash at the time and place of the burning to replace the house and each article consumed in it. This was held to be inaccurate, and calculated to produce confusion in the estimate of damages, and the better instruction to be that the measure of damages would be the value of the property destroyed at the time and place of the destruction. In Railroad Co. v Winslow, 66 Ill. 219, a case of condemnation of private property for railroad purposes, the company having taken the land and destroyed the buildings upon it, it is said: "For all the property of appellees taken by the corporation for their uses, or damaged by it, just compensation must be made to the owners. If a building stands in the way of the road which it is necessary to destroy, its value must be paid by the corporation, and the jury, in estimating its value, will take into consideration, not the value of the materials composing the building, but the value of the building as such."

The value of the property at the time and place of the fire is the question the jury is to pass upon. This the court charged, and the plaintiff admitted. Market value is what a thing will sell for. Railroad Co. v. Bunnell, 81 Pa. St. 414. To make a market, however, there must be buying and selling. Blydenburgh v. Welsh, 1 Baldw. 340. Property may have a value for which the owner may recover if it be destroyed, although it have no market value. Railroad Co. v. Stanford, 12 Kan. 354, 380. "Suppose," asks the court in the case just cited, "a rod of railway track, or a shade tree, or a fresco painting on the walls or ceiling of a house, or a bushel of corn on the western plains, should be destroyed, could there be no recovery for these articles simply because there might be no actual market value for the same?" To fix the market value of a thing, it seems to us that there must be a selling of things of the same kind. If there had ever been a sale of an hotel, or of any other building, in Tavares, we are not informed; and we have no judicial knowledge, nor does the record inform us, that hotels have a market value there. Yet, though there is no market value or standard value, the plaintiff should not be allowed more than the property destroyed by fire on the 9th of April, 1888, was reasonably worth in Tavares. To do this it is proper to invoke the aid of all facts calculated to show its value, and we are unable to perceive that the circuit judge erred in admitting the evidence of the cost of replacing the building on the day of the fire. It was a fact tending to show, and to be considered with others, by the jury in determining what amount of money would put the plaintiff in the position in which he was at the time. If there were any other facts incident to the condition of Tavares, considered in a business or other point of view, calculated to affect the value of this or any other property there, and which would qualify or outweigh the item of this cost of restitution, and such facts do not appear in the record, we are not responsible. It must be assumed there were none other existing. By saying the testimony was admissible we do not say what weight should be given it, nor do we come into conflict with the Tennessee and Illinois cases last mentioned. The evident meaning of those cases is that the cost of restitution or of the materials is not the measure of damages governing the jury, and not that such facts can never be considered in arriving at the true value or measure of damages. If an article has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, and its utility and use. 2 Suth. Dam. 378. In Luse v. Jones, 39 N. J. Law, 707, the plaintiff was permitted to show the cost of a bedstead as tending to prove its value. This cost was the price at which a regular dealer in such articles had sold it when new in the ordinary course of trade. "A sale so made," said the court, "was evidence of the market value of the thing when new, and the value of such goods when worn can scarcely be ascertained except by reference to the former price, and the extent of the depreciation. Of course, the cost alone would not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have." See, also, Sullivan v. Lear, 23 Fla. 463, 474, 2 South. 846. In Whipple v. Walpole, 10 N. H. 130, it was held it was admissible to prove what horses like those lost or injured cost at a town near the place where the loss occurred. Upon the same principle, and for even stronger reasons, we think that the cost of restitution at the time of the destruction of the building was an element which might be considered by the jury with others in ascertaining value.

The suggestion of appellant's brief that what a building is used for, whether it was a home or a business house, what income was derivable from it, where it was located, what its surroundings, enter into the consideration of value, is, as to the hotel, met by the evidence in this case, and, except as to that of income, the same may be said of the other buildings. Whether or not any of the buildings were profitable as investments at the time of the fire the defendant could, if such evidence was admissible, have elicited on cross-examination of plaintiff's witnesses, or by independent testimony, as might have been proper under the circumstances; and the same may be said also of the suggestion as to the "prospects" of these properties, and of the value of other property in the vicinity, and of the land after the houses were burned. "What were the whole premises worth in the market as they stood at the time of the fire," is, if we substitute the words "at Tavares" for "in the market," the question really submitted to the jury for decision.

The question of value in cases where, as here, there is no market value, is one peculiarly for the jury. Nothing has been permitted to go to this jury which it was improper for them to consider in coming to a conclusion as to the value of the several kinds of property involved. It cannot be assumed that there were other persons who would have testified to facts or circumstances other than those shown by the record, of a character to influence the jurors to a lower estimate of the values, or have themselves placed a less value on the property. The jury has returned a verdict according to its judgment, and it is undeniable that they have not given the plaintiff the benefit of the several values insisted upon by the plaintiff's chief witness, but it is apparent that, after considering all the facts and circumstances and testimony, the jury has said what they deemed the property to be worth, falling considerably below the aggregate of that witness' opinion. There was, in our judgment, sufficient evidence to sustain the verdict, and we fail to find in the brief any contention that the verdict should be reversed as being excessive. If there were such contention, we could not sustain it.

VIII. Upon the question of the allowance of interest as matter of right upon the amount of damages found by the jury, from the date of the destruction of the property in cases like this, where the damages sued for are unliquidated, the following authorities, with others that we have examined, hold, in effect, "that the jury may, at their discretion, allow and include interest in their verdict as damages, but not as interest eo nomine:" 2 Sedg. Meas. Dam. p. 190; authorities cited in note to Shelleck v. French, 6 Am. Dec. 196; Black v. Transportation Co., 45 Barb. 40; Railroad Co. v. Sears, 66 Ga. 499; Lincoln v. Claflin, 7 Wall. 132; Garrett v. Railway Co., 36 Iowa, 121; Brady v. Wilcoxson, 44 Cal. 239. In all these authorities no other reason is given for this rule than that it has been so held in other cases that have gone before them, except that in a few cases it is put upon the ground that where property is wrongfully taken and withheld, the defendant gets the benefit of its use during the detention, and is required to pay interest as compensation for such use, when in cases of property wrongfully destroyed the defendant derives no benefit therefrom. The answer to this theory is that, in cases of this kind for the negligent and wrongful destruction of property, the issue as to the amount of the compensation does not depend upon benefits that accrued therefrom to the defendant, whose negligent act brought about the destruction; but the issue rests wholly upon the question as to what is the sum of the damage to the party whose property has been destroyed. Neither do we think this theory can properly be applied even in cases of trespass and trover. Interest on the value of the property taken in those cases cannot correctly be said to be allowed to the plaintiff "because the defendant derives benefit from the use of the property," but is allowed to the plaintiff to compensate him for his deprivation of its use during the detention thereof. Suppose in this case the furniture in this hotel, instead of being destroyed, had been wrongfully taken by the defendant, and had been carried away and disposed of at once by gift to other parties, or had been destroyed by fire or otherwise after the taking, so that it really derived no benefit therefrom, in an action for the recovery of its value interest under the modern authorities would be recoverable as matter of legal right; but in such case, would the subsequent gift or destruction thereof, and absence of beneficial use to the defendant, have any effect upon the right to the recovery of interest? The answer in the negative is self-evident.

In Ancrum v. Slone, 2 Speer, 594, in which this question of interest is discussed at greater length than in any case we have examined holding this view, Frost, J., says: "To the argument, if interest may be allowed in the aggregate damages found by a verdict, why may it not be allowed eo nomine?—the reply is: The law does not inquire into the particulars of a verdict for damages, and in some cases interest furnishes a just and convenient measure for the jury. But it is a stated compensation for the use of money, and, as it cannot be separated, even in idea, from debt, seems not properly incident to uncertain and contingent damages. The distinction is admitted to be one of form, depending on the form and cause of action. It is necessary and obligatory by law, to maintain the forms of action, with the distinctive rules which govern them. If this argument is not allowed to be decisive, there is no reason why assumpsit should not be brought on a sealed instrument, or one form of action serve alike for all contracts as well as torts. Besides, in actions sounding in damages, the liability, amount, and time, necessary incidents for the allowance of interest, are not ascertained and determined until the verdict is rendered. Interest being stated damages on pecuniary liabilities, to find a sum with interest in an action sounding in damages is to allow damages on damages, which is an incongruity." The pith of the argument here is that the distinction grows out of and depends upon the "form" of action, and that it is necessary to maintain the "forms of action," with the distinctive rules which govern them. We cannot give our consent that matters of substance founded upon right shall be thus made subservient to the maintenance of the mere forms of action; or that money which rightfully belongs to a party shall be given when called by the name "damages," and withheld if chanced to be called "interest." In Parrott v. Ice Co., 46 N. Y. 361, the court says: "In cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages." In the case of Ancrum v. Slone, supra, the court says: "It is necessary to the allowance and estimate of interest to ascertain the sum due, and the time when payable." At what time does the liability for the negligent destruction of property attach to the wrong-doer if it shall be found that all things concur to set such liability in motion? It has been sometimes contended that such liability attaches only upon the finding of the jury. We do not think so. The verdict of the jury simply declares the liability and fixes the amount. The law attaches the liability at the time of the destruction, if all the circumstances attendant thereon concur in stamping the case with the legal elements of liability. As before seen, the measure of the loser's damage is the value of his property destroyed at the time of its destruction. Why at the time of destruction? Because it is at that time that the destroyer becomes liable for such value. The loser, before and at the time of such destruction, was entitled to his property, and the beneficial use of it; and instantly, upon such destruction, becomes, under the law, entitled to its value in money at the hands of the wrong-doer, and can sue instantly for such value. Because, through the law's delays, no opportunity is afforded to have the amount of that value declared by a jury for a year, perhaps several years, is it right that the loser shall, during all that time, be kept out of both his property, its use, and its value, without some remuneration for the retention by the wrong-doer of such value? Upon every principle of right we cannot think so. The theory of the measure of liability in such cases is just compensation. We cannot see either justice or completeness of the compensation dispensed under a rule that declares a party who wrongfully destroys another's property to be liable at the time of such destruction for the value thereof, but that permits the wrong-doer to withhold such value for years, without some compensation for such retention. We cannot appreciate the force of the argument of the learned judge in Ancrum v. Slone, supra, "that to allow interest in an action for damages would be to allow damages on damages." It is true that in a certain sense it is an allowance of damages on damages, (interest being a species of damage,) but it is not an allowance of damage on damage, for the same cause of damage. In the one case the principal sum —the value of the property destroyed—is awarded as the damage for the wrongful destruction; in the other, interest is allowed as the damage for the wrongful detention of such value. In Chapman v. Railway Co., 26 Wis. 304, Chief Justice Dixon says: "In trespass, trover, or replevin for the same property taken or converted by the defendants, such would have been the legal rule of damages; or, rather, the value, with interest from the time of the taking or conversion. Why should not the same rule prevail in this action? We are at a loss to assign any good reason for the distinction, if it can be said that it exists, or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, whilst in the others they must give it as a matter of strict legal right. We say we can see no good reason for the discrimination. The object of the rule, or of any rule of damages in any of the cases, is to give just and full compensation for losses actually sustained. It is obvious, regard being had to such compensation, which constitutes the foundation of the rule, that the giving of interest is as essential in this case as in any of the others. It is immaterial to the party who has lost his property, whether it has been taken and converted, or negligently destroyed by the other. His loss is the same in either case, and in either case he should be entitled to the same compensation." This view of the law accords fully with ours, and seems to be sustained also by the following authorities: 1 Suth. Dam. 174; Railroad Co. v. Marley, 25 Neb. 138, 40 N. W. 948; Mote v. Railroad Co., 27 Iowa, 22; Sayre v. Hewes, 32 N. J. Eq. 652; Derby v. Gallup, 5 Minn. 119 (Gil. 85). In the case of Milton v. Blackshear, 8 Fla. 161 (decided in 1858), relied upon to establish a contrary view, the question under discussion was not involved. The action in that case was upon an account for lumber sold and delivered; and there is nothing in the decision that conflicts with the views here expressed. Neither do we find anything in our statute that is inconsistent therewith. Our statute (page 585, § 1, McClel. Dig.; chapter 1483, Laws 1866) provides as follows: "The legal rate of interest to be charged on all notes, money, or liability of whatsoever character, and upon all judgments, shall be eight per centum per annum." In view of the charges given, we must assume that they were heeded by the jury, and that they included interest in their verdict from the date of the fire to the day of their finding upon the amount found by them to be the value of the property destroyed, which value, by arithmetical rules, we find to be, in round numbers, forty-five thousand and some hundred dollars. The remainder of the verdict of $52,909.03 represents interest found by the jury for the period of 2 years and 17 days intervening between the fire and the verdict. The established measure of damage in such cases being complete compensation, we feel that it would be doing a positive wrong to the plaintiff were we, because of these instructions on the question, to order either a new trial, or a remittitur of this sum, to which, upon every principle of right, the plaintiff is justly entitled. The errors assigned for giving the above-quoted 21st and 8th instructions on the subject of interest and measure of damage, and for the refusal to give the above-quoted 28th, 29th, and 30th, instructions asked for, cannot be sustained.

* * * * * * *

The member of the court whose name appears at the head of this opinion feels it is due to his associate, Mr. Justice TAYLOR, to say that he prepared about the same number of the subdivisions of this opinion as were prepared by such member.

The judgment is affirmed.

LINSLEY v. BUSHNELL.[1]

(15 Conn. 225.)

Supreme Court of Errors of Connecticut. July, 1842.

A. left his cart, filled with wood, by the side of the fence within the highway, before his homestead, in the evening; and the next morning, the cart was found in the travelled path, about five rods distant from the place where it was left, upset, lying on one side, and the wood by it, constituting together a dangerous obstruction in the road. By whom, or by what agency, this was done, did not appear; but A., knowing the situation of his property, and having a reasonable opportunity to remove it, suffered it to remain there two or three days, when B., travelling along the highway in the night, in a one-horse wagon, drove accidentally upon the cart and wood, without previously discovering them, by reason of which he was violently thrown from his wagon, and severely and dangerously injured.

Baldwin & Kimberly, for the motion. R. I. Ingersoll and C. A. Ingersoll, opposed.

CHURCH, J. 1. Questions of minor importance have been discussed upon this motion, which it may be well to dispose of, before considering the leading principle of the case.

First, it has been objected, that the testimony of Collins was improperly admitted. Collins testified, that, immediately after the plaintiff received the injury, the defendant said, "I did not mean to remove the cart and wood, until somebody got injured, and then make known who put them into the travelled road." And afterwards, he said, "What would you do? I am provoked every day. I won't touch the wood, if half Branford runs into it, and gets killed, &c." This testimony was admissible, for several reasons. It conduced to prove, that the defendant knew the situation of the cart and wood; that he recognized them as his own, and had not abandoned them, or resigned his claim to any trespasser; that he had a reasonable time to remove them, but purposely permitted them to remain; and also, it furnished strong evidence of the recklessness of the defendant; and if it did not prove any special malice towards this plaintiff, it might legitimately affect the question of damages in the case. Hall v. Steamboat Co., 13 Conn. 319; Sears v. Lyons, 2 Starkie, 317; Treat v. Barber, 7 Conn. 274; Churchill v. Watson, 5 Day, 140; Bracegirdle v. Orford, 2 Maule & S. 77; Merest v. Harvey, 5 Taunt. 442.

Secondly, it was objected that the facts claimed by the plaintiff do not sustain either count in his declaration. In the first count, it is alleged, that the defendant "wrongfully and unjustly put and placed, and caused to be put and placed, divers, to wit, ten logs of wood, and a large ox cart, in the said highway; and wrongfully and injuriously kept and continued, and negligently and wrongfully permitted the same to remain therein," &c. In the second count, it is alleged, that the defendant, "wrongfully and injuriously, kept and continued, and then and there negligently, knowingly and wrongfully permitted to be there kept and continued, and wrongfully and injuriously left in and upon said usually travelled path, &c., the said cart and logs," &c. The allegations in both counts substantially charge, not only that the defendant placed the cart and logs upon the travelled road, but also, that he wrongfully and negligently permitted them to remain and be kept there. We are strongly inclined to the opinion, that, in the absence of all proof that these incumbrances were placed upon the public highway, by any other person, the facts claimed by the plaintiff, would conduce, in some plausible degree, to prove, that they were placed there, by the defendant himself. At any rate, they prove conclusively the other charges, that the defendant wrongfully and negligently permitted them to remain and be kept there. Leslie v. Pounds, 4 Taunt. 649.

Thirdly, an objection is made to the charge of the judge in relation to the principle which might have influence in the assessment of damages. And cases from Massachusetts and New York, are relied upon in support of this objection. Whatever may have been formerly, or may be now the practice of the courts of other states upon this subject, we are certain our own practice has been uniformly and immemorially such as the judge recognized in his charge in this case. Nolumus leges mutare. We have no disposition to discard our own usages in this respect. We believe them to be founded in the highest equity, and sanctioned by the clearest principles. The judge informed the jury, that in estimating the damages, they had a right to take into consideration the necessary trouble and expenses of the plaintiff, in the prosecution of this action.

In actions of this character, there is no rule of damages fixed by law, as in cases of contract, trover, &c. The object is the satisfaction and remuneration for a personal injury, which is not capable of an exact cash valuation. The circumstances of aggravation or mitigation,—the bodily pain,—the mental anguish,—the injury to the plaintiff's business and means of livelihood, past or prospective; all these and many other circumstances may be taken into consideration, by the jury, in guiding their discretion in assessing damages for a wanton personal injury. But these are not all that go to make up the amount of damage sustained. The bill of the surgeon, and other pecuniary charges to which the plaintiff has been necessarily subjected, by the misconduct of the defendant, are equally proper subjects of consideration. And shall a defendant, who has refused redress for an unprovoked and severe personal injury, and thus driven the plaintiff to seek redress in the courts of law, be permitted to say, that the trouble and expense of the remedy was unnecessary, and was not the necessary result of his own acts, connected with his refusal to do justice?

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[1] Dissenting opinion of Waite, J., omitted.

There is no principle better established, and no practice more universal, than that vindictive damages, or smart money, may be, and is, awarded, by the verdicts of juries, in cases of wanton or malicious injuries, and whether the form of the action be trespass or case. We refer to the authorities before cited, and also to Dennison v. Hyde, 6 Conn. 508; Wort v. Jenkins, 14 Johns. 352; Merrills v. Manufacturing Co., 10 Conn. 384; Edwards v. Beach, 3 Day, 447. In this last case, Daggett, in argument for the defendant, admits, that where an important right is in question, in an action of trespass, "the court have given damages to indemnify the party for the expense of establishing it." The argument in opposition to the doctrine of the charge, is substantially founded upon the assumed principle, that the defendant cannot be subjected in a greater sum in damages than the plaintiff has actually sustained. But every case in which the recovery of vindictive damages has been justified, stands opposed to this argument. And we cannot comprehend the force of the reasoning, which will admit the right of a plaintiff to recover, as vindictive damages, beyond the amount of injury confessedly incurred, and in case of an act and injury equally wanton and willfully committed or permitted, will deny to him a right to recover an actual indemnity for the expense to which the defendant's misconduct has subjected him. In the cases to which we have been referred, in other states, as deciding a different principle, the courts seem to have assumed, that the taxable costs of the plaintiff are his only legitimate compensation for the expense incurred. If taxable costs are presumed to be equivalent to actual, necessary charges, as a matter of law; every client knows, as a matter of fact, they are not. And legal fictions should never be permitted to work injustice. This court has repudiated this notion. It was formerly holden in England, and perhaps is so considered now, that no action would lie for the injury sustained by the prosecution of a vexatious civil action, when there has been no arrest or imprisonment; because the costs recovered, compensated for that injury. But this court, in the case of Whipple v. Fuller, 11 Conn. 582, hold a contrary doctrine, and say: "We cannot, at this day, shut our eyes to the fact known by every body, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit."

2. But the question intended by the parties more particularly to be discussed and considered, arises from that part of the charge of the judge which relates to the liability of the defendant for the injury sustained by this plaintiff.

Conceding that this obstruction was not placed in the public highway by the agency of the defendant; the question is, whether upon the facts appearing on this motion and found by the jury, the defendant is liable at all? It is perhaps material, that it does not appear how, nor by what agency, the cart and wood of the defendant were removed from the road-side, where he left them; nor by what instrumentality they were placed upon the travelled part of the highway, where they occasioned the injury to the plaintiff; because much of the argument for the defence has proceeded upon the fact, as if it had been conceded, that some trespasser, without the defendant's knowledge, had done the act. Let this be conceded, and still we are not persuaded that it is material, because the question, after all, will recur,—what was the defendant's legal duty, after he had knowledge of the situation of his property, and after he had reasonable opportunity to remove it?

We do not think that any special property in the defendant's cart and wood, became vested in any trespasser, in any such sense as to exonerate this defendant from his obligation so to use his own property as that it should not injure another. Indeed, we cannot comprehend the principle which has been urged upon us in argument, that any right of property is acquired, by a mere act of wanton trespass, unaccompanied by a continued possession, and not followed by a judgment against the trespasser for its value. This property, for all legal purposes, was in the possession of the defendant; and he alone could maintain an action for it, founded upon a property right. Com. Dig. tit. "Biens, E."; Ros. Ev. 398.

Nor would it make any difference in the result, although the trespasser, by whom the property was unlawfully placed upon the travelled road, could be discovered, and although the plaintiff could sustain an action against him. The defendant's duties and obligations could not be varied, nor his responsibilities discharged, by this circumstance. An action will as well lie against him who continues a nuisance, as against him who erected it. And the cases are numerous, in which a plaintiff is permitted to make his election to proceed against one of several who may be liable. Of course, it cannot be material to the plaintiff's right of recovery, nor can it modify or change the defendant's liability, whether these obstructions were placed upon the highway, by the force of the elements, or by human agency. The question will still recur, what was the defendant's duty, after the situation of his property was made known to him?

"Sic utere tuo ut alienum non laedas," is a maxim expressive of an important and salutary principle, which we think applicable to this case, and to the legal obligations of this defendant. Nor is it less applicable, if it be conceded, that the defendant has done nothing more than knowingly and willingly to permit his property so to remain as to endanger others. He thus made and selected the public highway as its place of deposit, and is equally responsible, as if he had placed it there, by his own direct agency.

It has been very properly admitted, by the defendant, in argument, that the owner of beasts, who knows their dangerous propensities, is liable for the injurious consequences of such propensities, unless he uses reasonable efforts to restrain them. Thus, the owners of horses and cattle accustomed to wander, and of dogs accustomed to bite, are liable; and we perceive no essential distinction between such cases. and the present. Here, the defendant as well knew, that his property, placed in the centre of the public travelled road, would endanger the safety of travellers, as the owner of a ravenous dog knows, that the animal let loose, will do the same thing. There is no good sense in the distinction, which has been attempted to be made, between animate and inanimate property, in this respect. Nor can it make an essential difference, whether the injury be occasioned by the peculiar condition or situation of real or personal estate. If the owner of a weak and tottering wall, permits it to overhang a public street, without sufficient shores; if the owner of a gate permits it to stand open across the side-walk, at night, even if thrown open by a trespasser; if the owner of land, upon which a nuisance has been erected, by a stranger, permits it to remain: these are all cases, in which it is admitted, there would remain a legal responsibility upon such owners. But it is said, it is by reason of their possession of the premises. In the present case, as we have seen, the possession of this defendant was equally certain, and his control over the property equally absolute, as in the cases stated.

The burden of the defendant's claim has been, that, as he did not place the property in the public highway, he was under no legal obligation to remove it. Let this position be tested, by a few more cases, in addition to those already stated. A stranger, without the knowledge of the owner, unlooses a furious dog from his chain, or a tiger from his cage;—are no efforts necessary, on the part of the owner, to restrain them, after he is informed of their situation? A wrong-doer unfastens the stage-horses in a public street; is the owner justified in permitting them to remain loose, and thereby endanger the lives of the passengers within, and the travellers without?

This is not a case, where property has been taken wrongfully from the owner, and placed beyond his control; nor a case where he can be considered as having abandoned it, and as having no longer any possession of it. This defendant at all times asserted his ownership of the property; and after the injury was sustained, removed it into his enclosure and reclaimed it to his use. It is therefore essentially unlike the case of Rex v. Watts, 2 Esp. 676. In that case, the defendant's vessel was a complete wreck, and not worth raising. It was considered as abandoned, by the defendant, and therefore, he was under no obligation to remove it.

If the foregoing principles be correct, it follows, that the notice given by the defendant to the select-men of Branford to remove the obstruction, was immaterial.

No new trial is advised.

WILLIAMS, C. J., and STORRS and HINMAN, JJ., concurred. WAITE, J., dissented as to recovery of counsel fees.

GOODHART v. PENNSYLVANIA R. CO.

(35 Atl. 191, 177 Pa. St. 1.)

Supreme Court of Pennsylvania. July 15, 1896.

Appeal from court of common pleas, Mifflin county.

Action by James M. Goodhart against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Rufus C. Elder and George W. Elder, for appellant. D. W. Woods & Son, for appellee.

WILLIAMS, J. The plaintiff received the injury complained of while a passenger on one of the trains of the defendant company. The train was being moved in two sections. The first section, on which the plaintiff was riding, had stopped to repair a break in one of its air pipes, and had sent its flagman back to warn approaching trains. The second section, having been misled by the signal displayed by an operator at a signal tower, came along at full speed; and, its engineer failing to notice the flagman and his efforts to warn him of the position of the first section, the accident resulted, and the plaintiff was thrown from his seat, and injured. At the trial but two questions were raised: First. Was the accident and the consequent injury to the plaintiff due to the negligence of the employés of the defendant? If so, then, second, what was the proper measure of damages to be applied by the jury? It does not appear that any contest was made over the first of these questions. The only real ground for controversy was over the measure of damages, and the evidence should have been confined to the issues of fact that related to this controversy. The evidence in regard to the examination made by Dr. Morton was not directed to the extent of the plaintiff's injuries, but to the severity of the examination. Its evident object was to persuade the jury that the character of the examination and the conduct of Dr. Morton and his assistants was unnecessarily harsh and annoying, and was a proper subject to be considered in assessing the plaintiff's damages. But it must be borne in mind that a claim was being made against the railroad company for damages based upon an alleged injury received in consequence of the accident already referred to. In order to determine intelligently the extent of its liability, it was important for the defendant to know the nature of the injury, and the extent to which the plaintiff was affected by it. This could only be known as the result of a medical examination made by competent and experienced physicians. Dr. Morton and his assistants were selected as proper persons to make the examination, and advise the defendant company of their estimate of the plaintiff's condition, and its consequent liability. If, in the discharge of their professional duty to their employer, they went beyond what was reasonably necessary and employed methods and tests that were cruel, and such as the judgment of the medical profession does not approve, and thereby inflicted injury on the plaintiff, they are liable for their own trespass, whether committed with malice or through ignorance. But rudeness and incivility in the manner in which the examination was conducted, if rudeness or incivility can be affirmed of anything that was said or done in that connection, could throw no light on the extent of the injury actually suffered by the plaintiff, and the evidence referred to in the first and second assignments of error should have been rejected.

The remaining sixteen assignments of error relate, more or less directly, to the single question the case presented, viz. the measure of damages, and can be most conveniently considered together. Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. Owens v. Railway Co., 155 Pa. St. 334, 26 Atl. 748. The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues. Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured. Baker v. Pennsylvania Co., 142 Pa. St. 503, 21 Atl. 979. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases. By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be: What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper; but, in answer to the question, "How much?" the only reply yet made is that it should be reasonable in amount. Pain cannot be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation." in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for or made because of the suffering consequent upon the injury. In computing the damages sustained by an injured person, therefore, the calculation may include not only loss of time and loss of earning power, but, in a proper case, an allowance because of suffering. The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. And. Law Dict. 390. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error. It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandizing might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291. The basis on which this calculation must rest is not the possibility, as judged of by the expert witness, but the cold, commonplace facts as proved by those who knew them. It does not follow, as a necessary conclusion, that the services of the plaintiff were worth no more at the time of his injury than the $80 per month he was receiving from the company in whose service he was; but the fact that he accepted service at that price was an important one, and was persuasive, though not conclusive, evidence, that the price was considered by himself a fair one.

We think the twelfth assignment also points out a substantial error. The plaintiff was hurt on the 20th day of September, 1893. In May, 1894, he was appointed postmaster at Lewistown, Pa. at a salary which leaves him a net balance of $540 per year after the payment of all expenses. He is still holding the office and in receipt of the salary. Notwithstanding this fact, the learned judge said to the jury: "It seems to the court—and we do not understand that it is denied by the defendant—that, since the accident, he has been totally disabled and utterly unable to do anything." For 18 months before this instruction was given, the plaintiff had been receiving the salary attached to the office of postmaster at Lewistown, and had been giving sufficient attention to the duties of the office to see that they were properly performed by his clerks and deputies. In other words, he had been earning $540 per year, and was still earning it at the time the trial took place.

Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this it appears that the sum of $19,526.50 was given as the cost of an annuity of $1,750 per annum for 19 years. This calculation assumes (1) that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company whose president and manager he was. It assumes (2) that he had a reasonable expectation of life for 19 years, being at the time of the trial about 53 years old. It assumes (3) that his earning power, instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market, and purchase an annuity now, equal to his estimated earnings. The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums.

From what has been now said, it follows that substantially all of the assignments of error are sustained. The judgment is reversed, and a venire facias de novo awarded.

STERRETT, C. J., dissents.

LARSON v. CHASE.

(50 N. W. 238, 47 Minn. 307.)

Supreme Court of Minnesota. Nov. 10, 1891.

Appeal from district court, Hennepin county; Hooker, Judge.

Action by Lena Larson against Charles A. Chase for the unlawful mutilation and dissection of the body of plaintiff's husband. Demurrer to complaint overruled. Defendant appeals. Affirmed.

Bradish & Dunn and Babcock & Garrigues, for appellant. Aretander & Aretander, for respondent.

MITCHELL, J. This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed.

The contentions of defendant may be resolved into two propositions: First. That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to maintain an action for damages for its mutilation or disturbance; that, if any one can maintain such an action, it is the personal representative. Second. That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action. Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee (Hon. S. B. Ruggles) in Re Beekman Street, 4 Bradf. Sur. 503. See, also, Peirce v. Proprietors, 10 R. I. 227, 19 Am. Law Rev. 251, 10 Alb. Law J. 71. Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common law in its early stages refused to recognize the idea of property in a corpse, and treated it as belonging to no one unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. The general, if not universal, doctrine is that this right belongs to the surviving husband or wife or to the next of kin; and, while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise. We have no doubt, therefore, that the plaintiff had the legal right to the custody of the body of her husband for the purposes of preservation, preparation, and burial, and can maintain this action if maintainable at all.

The doctrine that a corpse is not property seems to have had its origin in the dictum of Lord Coke, (3 Co. Inst. 203,) where, in asserting the authority of the church, he says: "It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is caro data vermibus [flesh given to worms] is nullius in bonis, and belongs to ecclesiastical cognizance; but as to the monument action is given, as hath been said, at the common law, for the defacing thereof." If the proposition that a dead body is not property rests on no better foundation than this etymology of the word "cadaver," its correctness would be more than doubtful. But while a portion of this dictum, severed from its context, has been repeatedly quoted as authority for the proposition, yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is nullius in bonis, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts. But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commerical sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of Lynch v. Knight, 9 H. L. Cas. 577–598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental,—as for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In Meagher v. Driscoll, 99 Mass. 281, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead. Order affirmed.

SLOANE et al. v. SOUTHERN CAL. RY. CO. (L. A. 48.)[1]

(44 Pac. 320, 111 Cal. 668.)

Supreme Court of California. March 23, 1896.

Department 1. Appeal from superior court, Riverside county.

Action by Annie L. Sloane and another against the Southern California Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. On condition that plaintiff remit a part of the amount recovered, the order and judgment are affirmed.

W. J. Hunsaker, for appellant. Sweet, Sloane & Kirby and Works & Works, for respondents.

HARRISON, J. The plaintiff Annie L. Sloane purchased a ticket, April 8, 1894, from the agent of the defendant, at North Pomona, for passage from that place to San Diego, and on the same day took passage upon the regular passenger train of the defendant. Before reaching San Bernardino the conductor of the train took up her ticket, without giving her any check or other evidence of her right to be carried to San Diego, and on arriving at San Bernardino she was required to change cars, and enter another train of cars of the defendant. After entering this train of cars the conductor in charge thereof demanded of her her ticket, and upon her stating to him that she had given it to the conductor of the other train, and the circumstances therewith, she was informed by him that she must either pay her fare or leave the train. She had no money with her, and when the train reached East Riverside she left the car. After getting off the train, she started to walk back as far as Colton upon the railroad track, a distance of about three miles, but, after walking a portion of the way, secured a seat in a passing vehicle, and was carried to Colton, where she spent the night with her sister-in-law. On the next day, having borrowed some money with which to purchase another ticket, she resumed her passage, and was carried to San Diego. The present action was brought to recover damages sustained by reason of the wrongful acts of the defendant's agents. The cause was tried by a jury, and a verdict rendered in favor of the plaintiffs for the sum of $1,400. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

It is contended by the appellant that, as the plaintiff left the car at East Riverside in accordance with the previous directions of the conductor, and no personal violence was used or displayed towards her, her only right of action is for a breach of the defendant's contract to carry her to San Diego, and that the extent of her recovery therefor is the price paid for the second ticket, and a reasonable compensation for the loss of time sustained by her. The plaintiff's right of action against the defendant is not, however, limited to the breach of its contract to carry her to San Diego, but includes full redress for the wrongs sustained by her by reason of the defendant's violation of the obligations which it assumed in entering into such contract. If she was wrongfully prevented by the defendant from completing the passage to San Diego for which it had contracted with her, she could either bring an action simply for the breach of this contract, or she could sue it in tort, for its violation of the duty, as a common carrier, which it assumed upon entering into such contract. Jones v. The Cortez, 17 Cal. 487; Head v. Railroad Co., 79 Ga. 358, 7 S. E. 217; Carsten v. Railroad Co., 44 Minn. 454, 47 N. W. 49. The complaint in the present case is not merely for the breach of the contract, nor is it merely for the wrong committed in excluding her from the car, but it is to recover the damages sustained by her by reason of the wrongful acts of the defendant committed in the violation of its contract. It is in the nature of an action on the case, arising out of the conduct of the defendant in wrongfully depriving her of her ticket, and thereafter, by reason of such wrongful act, excluding her from its car, and refusing to carry out its contract. Although her action is for the tort resulting from the defendant's conduct, the wrong which produced that result was twofold,—depriving her of the evidence of its contract to carry her to San Diego, and afterwards excluding her from its car for failure to produce the evidence of which it had wrongfully deprived her. For the purpose of giving her this right of action, it is immaterial that these different acts were by different agents of the defendant. If the conductor who took up the ticket had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its train to different conductors. Muckle v. Railroad Co., 79 Hun, 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars.

In her testimony regarding her exclusion from the cars, the plaintiff recounted the interview between her and the conductor, and the manner in which she was directed to leave the car, and it was claimed at the trial that she had been thereby subjected to humiliation and indignity, for which she was entitled to redress. Counsel for the appellant does not question, as a proposition of law, that, if the conductor was insulting and violent in removing her, such treatment forms an element of damage to be recovered by her; but he maintains that the evidence fails to show such conduct. The evidence was, however, before the jury, and they were properly instructed in reference thereto; and, although it might be urged upon them that this evidence was insufficient to establish such conduct, we cannot say, as a matter of law, that it was not proper to submit the question to their judgment.

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[1] Rehearing denied.

Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental excitement; and that, by reason of the excitement caused by her exclusion from the car, there had been a recurrence of insomnia and of these paroxysms. The court instructed the jury that, if they found for the plaintiffs, "in assessing damages, if it appears from the evidence that the plaintiff Annie L. Sloane was wrongfully deprived of her right to ride on defendant's cars, and expelled therefrom in a manner and under circumstances calculated to inflict, and which did inflict, feelings of indignity and insult, the jury is authorized to consider, under the evidence, the injured feelings of the plaintiff, the indignity endured, her mental suffering, the humiliation and wounded pride which one in her condition of life and standing in the community would experience, together with any bodily harm or suffering occasioned, and to award such an amount for damages as will compensate her for such humiliation, suffering, and other detriment." The jury were not specially instructed with reference to any damages that might have been sustained by reason of the recurrence of this disturbance of the nervous system, but it is reasonable to suppose that the above evidence was offered by the plaintiffs for the purpose of recovering damages for the injury that might be thus established, and that, under that portion of the above instruction in which the jury were authorized in assessing damages to consider "any bodily harm or suffering occasioned" by the expulsion of Mrs. Sloane from the cars, it was intended that they should consider this evidence, and the injury which it established. The defendant objected to the introduction of the evidence, and excepted to the instruction, and insists that under no circumstances could the jury consider this effect upon the plaintiff as an element of damage for which the defendant is liable; that the court should not have directed the jury to consider any mental suffering experienced by her.

Counsel for the appellant has discussed, in his brief, the want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. To the extent that the term "mental suffering" is included in the above instruction, this proposition is inapplicable. The term, as there used, is to be construed with reference to the context in which it occurs. The "mental suffering," there named, is not the mental anguish or pain referred to in the above proposition cited by the appellant, but is the mental experience which is concomitant with the insult, indignity, and humiliation named in the instruction. It would be a contradiction of terms to hold that the individual whose pride had been humiliated, or whose dignity had been insulted, had no mental suffering in connection therewith, or that this humiliation and insult did not of themselves constitute mental suffering; that he could have redress for the injured pride, but not for the mental suffering it produced. Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. 3 Suth. Dam. § 1245.

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of Bell v. Railway Co., L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said: "It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of its opinion, Lord Chief Baron Palles says: "In conclusion, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time." This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77–81), also comments upon it with great approval. In Purcell v. Railroad Co., 48 Minn. 134, 50 N. W. 1034, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and, she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." See, also, Canning v. Inhabitants of Williamstown, 1 Cush. 451; Seger v. Town of Barkhamsted, 22 Conn. 290; Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646; Stutz v. Railroad Co., 73 Wis. 147, 40 N. W. 653; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848. "It is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even though the harm done consists mainly of nervous shock." Warren v. Railroad Co., 163 Mass. 484, 40 N. E. 895.

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were authorized to include in their verdict whatever damage she had thus sustained. Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. Civ. Code, § 3333. If the facts under which she was excluded from the car would be an act of negligence on the part of the defendant as to any and all persons, whoever might sustain injury by such act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm. In Railroad Co. v. Kemp, 61 Md. 74, 619, the plaintiff was injured upon a car of the defendant, and thereafter a cancer developed itself upon her breast at the place where she had been hurt. Testimony was given to the effect that such hurt was sufficient to cause the development of the cancer, and that, in the opinion of the experts, they would attribute it to that cause. It was shown that, previous to the accident she had been in apparently good health and condition. The court held that it was for the jury to determine, from the evidence, whether the cancer did result from the injury, and, if so, that the defendant was liable, even though it had no reason to anticipate such a result. "It is not for the defendants to say that, because they did not or could not in fact anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know and to contemplate all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act." See, also, Fell v. Railroad Co., 44 Fed. 253.

The court properly left to the jury to determine whether Mrs. Sloane exercised reasonable prudence in undertaking the walk from East Riverside to Colton, and, if so, that the injury sustained by her was a proper element of damage to be recovered. It could not say, as matter of law, or instruct the jury, that under the evidence before them, such walk was or was not necessary, or whether the route selected by her was the most feasible; nor would it have been justified in directing them not to allow compensation for any injury sustained by the walk, upon the ground that, if she had waited a few hours, she could have gone upon the cars. Malone v. Railroad Co., 152 Pa. St. 390, 25 Atl. 638.

The refusal of the court to strike out certain portions of the complaint as irrelevant is not a ground for reversal of the judgment. The matter embraced therein was relevant to the plaintiffs' right of recovery, and they were justified in setting forth in their complaint the several acts of the defendant which constituted the wrong for which they sought redress. The defendant does not claim to have been prejudiced by any of the probative matters contained in these allegations, and, even if this matter might have been properly struck out by the court, after the cause has been tried upon its merits the judgment will not be reversed for such technical error.

The demurrer to the complaint was properly overruled. The cause of action set forth therein is neither ambiguous nor uncertain. It clearly states a single ground of recovery, viz. the unlawful violation by the defendant of the obligation it had assumed to carry Mrs. Sloane to San Diego; and, although the damages caused to her by this violation of its obligation were made up of the injuries to her person, as well as the money paid by her as the consideration of this obligation, they all resulted from the wrong committed by the defendant. It was necessary that she should point out the particulars in which she had sustained injuries from the defendant,—the humiliation, injuries to her health, etc.,—in order that evidence thereof might be given at the trial, and also that the defendant might be prepared to meet such evidence; but it was not necessary that she should designate the particular amount of damage which she had sustained by reason of the indignity that she had been compelled to undergo, distinct from the amount sustained from the injury to her health. These elements of damage were not capable of computation, nor would evidence of such amount have been admissible. This amount was to be determined by the jury, in the exercise of an intelligent discretion.

Neither does the action of the court in striking out a portion of the defendant's answer justify a reversal of the judgment. The denial of an allegation in the complaint for want of sufficient information and belief to enable the defendant to answer the same justifies the court in disregarding or striking out such denial, if the matter is presumptively within the knowledge of the defendant; and, although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of information and belief, if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief upon the subject. In the present case it, moreover, clearly appears that the defendant was not prejudiced by the action of the court. In a separate defense to the action, the defendant directly alleged many of the facts which, in the portion of the answer thus struck out, it had denied for want of information and belief; and, although an admission in one defense is not available as against a denial in another, it is competent for the court to consider such admission for the purpose of determining whether the answer containing the denial is sham or evasive. After the ruling of the court, the defendant amended its answer by directly denying the matters alleged in one of the paragraphs which the court held had been insufficiently denied, and at the trial it stipulated to the truth of the matters that had been denied by it in another of the paragraphs which was stricken out. The defendant was, therefore, not precluded from defending the action in any particular upon which it relied. After a cause has been tried upon its merits, a ruling of the court either in striking out, or in refusing to strike out, a portion of a pleading, will not justify a reversal of the judgment, if it appears that the party against whom the ruling was made has not been prejudiced thereby, and has been able to present to the court his entire cause of action or defense. Mere technical error, unaccompanied by injury, will be disregarded. Code Civ. Proc. § 475.

The court did not err in its instructions to the jury respecting the measure of care which a railroad company must exercise towards its passengers. Rorer, R. R. p. 951; Railroad Co. v. Homer, 73 Ga. 251. The passenger is not required to question the action of the conductor in taking up his ticket, but has to assume that his conduct in taking or withholding the ticket is in accordance with the rules of the company. It is therefore incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the ticket from the passenger, the latter shall be provided with the means of continuing his journey. It is not error to hold that this requires extreme care and diligence. We are of the opinion, however, that the damages allowed by the jury were excessive, and not justified by the evidence. They were properly told that they could not award the plaintiff exemplary damages, but only such as would be a full and fair compensation to her for the injury and detriment she had suffered as the proximate results of the defendant's wrongful acts. The testimony tending to show that the conductor was rude and insulting in directing her to leave the train at East Riverside is quite meager, and consists more of her statement of its character than of the language used by him. The jury were instructed that, in estimating the amount of damages she could recover by reason of the humiliation in being excluded from the car, they were not at liberty to consider her peculiar nervous temperament, but to allow only such damages as would have resulted to a person of ordinary or usual temperament. So, too, the evidence concerning the effect of this expulsion from the car upon her nervous condition consists more of general statements than of details, and it does not appear that this effect was of more than brief duration. She does not claim to have sustained any direct physical injury by reason of the walk to Colton. She testifies, as do also her husband and Dr. Averill, that, except for her nervous condition, she was in fair health, and that she was abundantly able to take a walk of two or three miles; and it is not suggested that the walk had any effect upon her nervous condition, or that she suffered any direct inconvenience therefrom after her return to San Diego. The walk itself was not attended with any unusual inconvenience. It was upon the railroad track, in a level country, on an afternoon in April. The distance is not given, but, after going about a mile, or as far as the railroad bridge, she was taken into a passing vehicle, and carried to Colton. While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited, discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict.

The judgment and order denying a new trial are reversed, unless the plaintiffs shall. within 30 days after the filing of the remittitur in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of $1,000. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order shall stand affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

MITCHELL v. ROCHESTER RY. CO.

(45 N. E. 354, 151 N. Y. 107.)

Court of Appeals of New York. Dec. 1, 1896.

Appeal from supreme court, general term, Fifth department.

Action by Annie Mitchell against the Rochester Railway Company. From an order (28 N. Y. Supp. 1136) affirming an order (25 N. Y. Supp. 744) setting aside a nonsuit, defendant appeals. Reversed.

Charles J. Bissell, for appellant. Norris Bull, for respondent.

MARTIN, J. The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. Lehman v. Railroad Co., 47 Hun, 355; Commissioners v. Coultas, 13 App. Cas. 222; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: Haile v. Railroad Co., 60 Fed. 557; Joch v. Dankwardt, 85 Ill. 331; Canning v. Inhabitants of Williamstown, 1 Cush. 451; Telegraph Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435; Allsop v. Allsop, 5 Hurl. & N. 534; Johnson v. Wells, Fargo & Co., 6 Nev. 224; Wyman v. Leavitt, 71 Me. 227. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. The orders of the general and special terms should be reversed, and the order of the trial term granting a nonsuit affirmed, with costs. All concur, except HAIGHT, J., not sitting, and VANN, J., not voting. Ordered accordingly.

TURNER v. GREAT NORTHERN RY. CO.

(46 Pac. 243. 15 Wash. 213.)

Supreme Court of Washington. Aug. 31, 1896.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by W. W. D. Turner against the Great Northern Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. Wellington, Jay H. Adams, and M. D. Grover, for appellant. Graves & Wolf, for respondent.

ANDERS, J. This was an action for damages for the failure on the part of the defendant to transport the plaintiff and his wife over its line of railway from St. Paul, Minn., to the city of Spokane, in accordance with its agreement and duty. The material facts set forth in the complaint are, briefly, that the defendant is, and at all the times mentioned in the complaint was, a corporation operating a line of railway from St. Paul to Seattle by way of the city of Spokane; that on May 30, 1894, the plaintiff purchased from the agent of defendant at St. Paul tickets for himself and wife, and procured checks for their baggage, over defendant's railway from St. Paul to Spokane, and was induced so to do by the representation of said agent that defendant's passenger train which would leave St. Paul on the said day would reach the city of Spokane on the morning of the 2d day of June following, and that the tickets purchased from the defendant's agent were limited to that time and train; that defendant then well knew that it had not been able to run a through train from St. Paul to Spokane for several days prior to that time, and that, owing to a serious break in its roadbed west of Havre, it would not be able to run such through train for a long time thereafter, which fact it negligently and fraudulently concealed from the plaintiff; that plaintiff and his wife took passage on defendant's passenger train which left St. Paul on the evening of May 30, 1894, and when said train reached Havre the conductor thereof informed the plaintiff that, because of some damage to defendant's road further west, in the state of Idaho, the train would proceed no further, but that the plaintiff and his wife would be taken on defendant's line of railway to Helena, Mont., from which place they would be carried to their destination over the line of the Northern Pacific Railroad Company, and that the tickets then held by plaintiff were good, and would be honored for transportation over that road; that plaintiff arrived at Helena on June 1st, and on the following day boarded the first west-bound Northern Pacific train, and presented his tickets to the conductor, who refused to accept them for transportation, and required the plaintiff to pay the fare for himself and wife to Missoula,—that being the end of the conductor's division; that, owing to serious damage to that road, caused by high water, plaintiff could proceed no further, and was compelled to remain in Missoula from the 2d to the 20th day of June; that on said last-mentioned day plaintiff paid the fare demanded for transportation to his home at Spokane, which place he reached on the 21st day of June, having been delayed over night at Hope, Idaho; and that the expense necessarily incurred for extra railroad fare and for board and lodging during the delays at Helena, Missoula, and Hope was $86.20. It is averred in the complaint that: "During their detention and delay plaintiff's said wife, in consequence of said delay and her anxiety of mind as to their situation, became sick at said city of Missoula, and was confined to her bed for several days, and plaintiff was much worried, vexed, and annoyed because of his inability to make his wife comfortable, situated, as they were, at an hotel, among strangers, far from home, and without access to their baggage; that because of said detention and delay, and of his inability to reach his said home, plaintiff was greatly harassed, troubled, and perplexed about his business, and it otherwise caused him great annoyance, vexation, and anxiety of mind because of his embarrassed situation, the uncertainty when they would reach their home, and the great dangers incident to traveling at that time; * * * that, in addition to said extra expense made necessary, as aforesaid, because of defendant's negligent and fraudulent conduct in the premises, and of plaintiff's delay and detention, as aforesaid, and consequent loss of time, worriment, trouble, annoyance, and anxiety of mind, as aforesaid, he has been damaged in the further sum of $1,000." The plaintiff accordingly demanded judgment against the defendant for $1,086.20. The defendant moved the court to require the plaintiff to furnish a bill of particulars showing the respective amounts claimed for loss of time, trouble, annoyance, disappointment, and anxiety of mind, which motion was denied. The defendant then answered, denying all the allegations of the complaint except that relating to the incorporation and business of the defendant, and that the plaintiff purchased the tickets mentioned in the complaint. From a judgment in favor of the plaintiff for the sum of $750, this appeal is prosecuted.

It is claimed by defendant that it had a right, under section 205 of the Code of Procedure, to be advised, in advance, of how much plaintiff sought to recover for loss of time, how much for anxiety of mind, etc., that it might be prepared with its proofs to meet the allegations of the complaint, and that, if the allegations as to loss of time, trouble, annoyance, and disappointment of mind authorized the introduction of any proof, the damages were special, and the defendant was entitled to a statement of the particular items. It has been repeatedly held in New York, under a statute like ours, and seems to be the settled rule, that the granting or refusing of a motion for a bill of particulars is within the sound discretion of the trial court, and its ruling in that regard will not be reviewed on appeal, except in cases where there has been a palpable abuse of such discretion. Tilton v. Beecher, 59 N. Y. 176; People v. Tweed, 63 N. Y. 194; Dwight v. Insurance Co., 84 N. Y. 493. No such case, we apprehend, is presented here. The object of the statute is to enable a party reasonably to protect himself against surprise on the trial (Butler v. Mann, 9 Abb. N. C. 49); but we are unable to see how the defendant could have been surprised by the testimony adduced by the plaintiff corroborative of the averments of the complaint, to which defendant's motion for a bill of particulars was especially addressed. So far as the complaint is concerned, its allegations were sufficient to let in the evidence admitted. The damages claimed, or at least those claimed for loss of time, were general, and therefore were not required to be specifically alleged. Thomp. Carr. Pass. p. 550.

It appears from the testimony of plaintiff that he purchased his tickets for transportation at the office of the Union Depot at St. Paul, and not at the office of the defendant company, and that the person from whom he purchased them was engaged in selling tickets over various other lines of railway whose trains entered and departed from that depot. Upon the trial the court permitted the plaintiff, over the objection of defendant, to detail a conversation between himself and the ticket seller, which occurred at the time the plaintiff purchased his tickets, in which the ticket seller stated, among other things, that defendant's trains were running through to Spokane on schedule time, and, if there were no accidents, plaintiff would arrive at his destination on the morning of June 2, 1894. It is contended that this was error, for the reason that it was not shown that the person who made these statements was an agent of the defendant, and authorized to bind it by such declarations. But the fact that the tickets so sold were furnished by the railway company, and were accepted as its tickets by the conductors of its trains, would seem to be sufficient proof that the seller was a ticket agent of the company, and therefore clothed with the usual powers of such agents. It is generally the fact that there is no other person than the ticket agent at a railroad station who can give travelers the necessary information as to the arrival, departure, and running time of trains, and the rule, as formulated by a learned text writer, is that passengers have a right, until otherwise informed, to rely on information received by them from ticket agents, in answer to inquiries concerning those matters, provided they do not disregard other reasonable means of information. 3 Wood, R. R. (Minor's Ed.) 1654. The testimony objected to was certainly competent for the purpose of showing that the plaintiff himself was not in fault in taking the particular train on which he started home. It was also competent as tending to prove the contract between the parties; but, for that purpose, it was comparatively unimportant, in view of the fact that the tickets themselves, which were prima facie evidence of the defendant's contract, represented upon their face that plaintiff would be carried to his destination within the time mentioned by the ticket seller.

Objection is made by the defendant to the action of the court in permitting the respondent to state to the jury the amount he was compelled to pay for board and lodging and other necessary expenses for himself and wife while at Missoula, and it is urged with much earnestness that the expense incurred at that place was not the result of the breach of defendant's contract, but of an independent, intervening cause, viz. the inability of the Northern Pacific Railroad Company, upon whose line the plaintiff had become a passenger, seasonably to carry him to his destination. The fact is, however, that the plaintiff and his wife, while at Missoula, were not passengers on the Northern Pacific Railroad, and the company operating that road had violated no contract with them, or duty or obligation concerning them. It carried them safely and promptly to that place, and thereby discharged its whole duty. If plaintiff had, on arriving there, requested it immediately to convey him to Spokane, the fact that its road had been so damaged by floods and high water that it could not move its trains would have been a legal excuse for a failure to comply with such request. The plaintiff had no right of action against the Northern Pacific Railroad Company for damages suffered by reason of the delay at Missoula, and it therefore follows that, if the defendant is not liable therefor, the plaintiff is without remedy, and must suffer a loss occasioned by no fault on his part. But we do not think that the plaintiff is thus remediless. It was his privilege, if not his duty, on being informed that the defendant was unable to transport him in accordance with the terms of its undertaking, to procure some other reasonable means of conveyance, and proceed on his journey. He chose what seemed to him, and apparently to the conductor of the defendant's train, to be the most direct and expeditious route, and which, so far as we are advised, was the only one practicable. The omission of the defendant to fulfill its engagement caused the plaintiff to seek transportation over the Northern Pacific Railroad, and it is therefore justly liable for the expense thereby incurred, including that incident to unavoidable delay. 3 Suth. Dam. (2d Ed.) § 936; 2 Sedg. Dam. (8th Ed.) § 864.

In answer to the question, "Now, Colonel, I wish you would go on and state to the jury what, if any, anxiety, worriment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court, in consequence of this delay," the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula, as they did their passengers; his means were limited, and he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick, and lay in bed three days, in consequence of her worriment, and that he could not make her comfortable under the circumstances. Damages for "worriment" and disappointment resulting from such circumstances are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover, for worry and mental excitement, such sum as would fairly and reasonably compensate him therefor. "Damages will not be given for mere inconvenience and annoyance such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." 1 Sedg. Dam. (8th Ed.) § 42. And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of a common carrier. Trigg v. Railway Co., 74 Mo. 147; Hobbs v. Railway Co., L. R. 10 Q. B. 111; Hamlin v. Railway Co., 1 Hurl. & N. 408; Walsh v. Railway Co., 42 Wis. 23. Nor, in an action against a railroad company for a refusal to carry, can the plaintiff recover damages for fatigue suffered by him in walking to his place of destination, or for mental and physical suffering caused by sickness contracted in such walk. Railway Co. v. Thomas (Tex. Civ. App.) 27 S. W. 419. But it is urged by the learned counsel for plaintiff that this court, in the case of Willson v. Railroad Co., 5 Wash. 621, 32 Pac. 468, and 34 Pac. 146, repudiated the doctrine that damages cannot be recovered for mental suffering which is not connected with physical injury, and that the testimony and the instruction as to mental anxiety and excitement above mentioned were in accordance with the principle there announced. That was an action for damages for an unlawful expulsion of a passenger from a railway train, and, while it is true that we held, in accordance with what was deemed to be the weight of authority, that the plaintiff was entitled to compensation for the sense of wrong suffered and the feeling of humiliation and disgrace occasioned by the wrongful act, we did not undertake or intend to announce any rule with respect to the measure of damages in a case like the one at bar. That case is clearly distinguishable on principle from this, and the decision therein, in our judgment, in no wise militates against the views we have here expressed. In the Willson Case the court proceeded upon the theory that humiliation and mental distress were the natural and proximate, if not in fact the necessary, result of the wrongful act of the defendant; but in the present case the necessary element of proximity is wholly wanting. The case of Railway Co. v. Berry (Tex. App.) 15 S. W. 48, cited by plaintiff, and which supports his contention, seems to us to be contrary to sound policy, and opposed to the general current of authority. In fact, the trial court, in one portion of its charge to the jury, recognized and announced what we hold to be the correct doctrine, when it stated to the jury that the plaintiff could not recover damages for any mental suffering experienced by reason of the refusal of the conductor of the Northern Pacific Railroad Company to accept the tickets tendered to him by plaintiff for transportation; and for what reason, then, it told the jury that the plaintiff was entitled to damages for mental anxiety and suffering endured in consequence of his delay, we are unable to perceive. Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded.

It appears from the evidence that the plaintiff is an attorney at law, and well known as such at Spokane, but that he had not been engaged in the practice of his profession for two years prior to the time when his alleged cause of action arose; and upon the trial he testified that he estimated the time lost by his being delayed to be reasonably worth the sum of $25 per day. Two other attorneys were also called as witnessses for plaintiff, one of whom stated that the services of attorneys of the ability and learning of the plaintiff, who were engaged in active practice in Spokane during the month of June, 1894, were worth from $25 to $30 per day, and the other that they were worth from $30 to $40 per day. All of this evidence was objected to on the alleged ground that it was incompetent, irrelevant, and immaterial, and it is here insisted that the court erred in overruling the objection. Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession (for it is as a lawyer only that he claims damages for loss of time) had he been at home during such delay; but to entitle him to a recovery it was incumbent upon him to prove such amount by competent and legal evidence. As to the proof of damages for time lost by professional men, Mr. Sedgwick says: "In the case of most professional men, there can be no way of fixing a general scale of remuneration. The exclusive services of such men cannot be measured by any pecuniary scale common to a whole class. The most trustworthy basis of damages in such a case is the amount which the injured party has earned in the past. This is, however, only evidence from which the jury will be enabled to say what the services of such a man as the plaintiff are worth, and the jury should distinctly understand that it is not to be taken as the necessary and legal measure of damages." 1 Sedg. Dam. (8th Ed.) § 180. And this statement of law seems to be amply supported by the authorities. It is apparent, therefore, that the "most trustworthy basis of damages" was not adopted in the trial of this cause. There was no proof whatever of what the plaintiff actually earned as an attorney, either before or after the particular time in question. Of course, he earned nothing immediately before that time, because he had not been engaged in the practice of the law for the preceding two years; but, as he resumed the practice of his profession immediately after his arrival at Spokane, we think it would have been proper to have shown what he earned thereafter, not as establishing in itself the value of his time, but as evidence to aid the jury in fixing it. It would even have been permissible to submit to the consideration of the jury, under proper instructions, proof of the earnings of the plaintiff when previously engaged in practicing law in the city of Spokane; but we are inclined to the opinion that it was hardly proper to prove what the time of practicing attorneys was worth, as that would constitute no fair basis of damages, where the value of a person's time depends so much upon his individual exertions. Neither was it proper to permit the plaintiff himself to state his own opinion or "estimate" of the value of his time, without stating the facts upon which such opinion was based. Indeed, the testimony of each of the witnesses who testified as to the value of an attorney's time was substantially nothing more than an expression of his individual opinion upon the subject, and the question involved was not one of science or skill, such as could not be determined by a jury of ordinary intelligence, without the aid of the opinions of others. If facts only had been stated, the jury could have drawn their own conclusions. Upon this issue the jury were instructed that for loss of time plaintiff was entitled to recover such sum as his time at home, for the period he was delayed by reason of defendant's failure to transport him, was reasonably and fairly worth in his profession or business; and as an abstract proposition of law the instruction was correct, but as applied to the proofs it was misleading, because it virtually authorized the jury to adopt the amount stated by the plaintiff himself, or that which they might infer from the testimony of either of the other witnesses, to be the reasonable value of plaintiff's time, as the absolute and certain measure of damages. Even if it were conceded that the evidence was admissible, and that it showed a "general scale of remuneration" common to all attorneys such as the plaintiff, the instruction would still be open to the same objection, for it left out of consideration entirely the probability that plaintiff would have had professional employment had he been at home during the period of his detention. Yonge v. Steamship Co., 1 Cal. 353; 3 Suth. Dam. (2d Ed.) § 936; 2 Sedg. Dam. (8th Ed.) § 863. The jury should have been distinctly charged to weigh that probability, for the manifest reason that the plaintiff's right to damages for loss of time depended upon the fact whether the time during which he was delayed would have been of pecuniary value to him if he had arrived at his destination without detention. Under the instruction as given the jury were left to determine, as best they could, the amount of damages, without being informed as to the rule by which such damages should be measured. It is difficult, at best, to determine the value of time in a case like this, where such value is not governed by any established rate of wages; and it is therefore highly important that the jury should be fully informed as to the rules and principles by which they should be guided.

What we have already said renders it unnecessary for us to specially consider the remaining points made by the defendant. The judgment must be reversed, and the cause remanded for a new trial.

HOYT, C. J., and GORDON, J., concur.

DUNBAR, J. I dissent. I think no substantial error was committed by the court, and the judgment should be affirmed.

SUMMERFIELD v. WESTERN UNION TEL. CO.

(57 N. W. 973, 87 Wis. 1.)

Supreme Court of Wisconsin. Jan. 30, 1894.

Appeal from superior court, Douglas county; Charles Smith, Judge.

Action by Fred G. Summerfield against the Western Union Telegraph Company for damages for delay in transmitting a message. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for damages for delay in the delivery of a telegram. Plaintiff resided on a farm about 10 miles from the village of Iron River, Wis. His mother lived at Lisbon, N. D., with plaintiff's brother J. W. Summerfield. Defendant had an office at each of these places. October 23, 1892, J. W. Summerfield left at defendant's office at Lisbon a message addressed to plaintiff, care of Burt Clark, Iron River, reading as follows: "Mother is dying. Come immediately. J. W. Summerfield." The fees for the transmission of the message were paid, but the evidence tended to show that the message was negligently delayed, and was not delivered to Clark until October 28, 1892, and plaintiff did not receive it until after noon of that day. Plaintiff's mother died on the 26th day of October. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in due time, and that, by reason of his failing to receive the message until after his mother's death, he was deeply "mortified, grieved, hurt, and shocked, and suffered intense anguish of body and mind, and was thereby thrown into a state of nervous excitement and tremor, which rendered him sick, and impaired his health and strength, and that he still suffers from the effect of the same." Upon the trial, objection was made to the reception of any evidence under the complaint, because it did not state facts sufficient to constitute a cause of action, which objection was overruled, and exception was taken.

The court charged the jury, among other things, as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that, if it had been delivered with reasonable promptness, the plaintiff could and would have responded thereto, and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's deathbed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering and damages, if any, to his nervous system, caused by the shock of such mental suffering." A verdict for the plaintiff for $652.50 was rendered, and, from judgment thereon, defendant appealed.

Catlin & Butler, Carl C. Pope, and La Follette, Harper, Roe & Zimmerman (Geo. H. Fearons, of counsel), for appellant.

Mental anguish alone, caused by the negligent failure of a telegraph company to promptly transmit and deliver a message, will not sustain an action for damages by the addressee. Wyman v. Leavitt, 71 Me. 227, 230; Bovee v. Danville, 53 Vt. 183, 190; Canning v. Williamstown, 1 Cush. 451, 452; Paine v. Railway Co., 45 Iowa, 569, 573, 574; City of Salina v. Trosper, 27 Kan. 544, 564; Keyes v. Railway Co., 36 Minn. 290, 293, 30 N. W. 888; Clinton v. Laning, 61 Mich. 355, 361, 28 N. W. 125; Kennon v. Gilmer, 131 U. S. 22, 26, 9 Sup. Ct. 696; Ewing v. Railway Co., (Pa. Sup. 1892,) 23 Atl. 340; Railway Co. v. McGinnis, 46 Kan. 109, 113, 26 Pac. 453; Commissioners v. Coultas, 13 App. Cas. 222, 225.

McHugh, Lyons & McIntosh, for respondent.

"Mental anguish and suffering occasioned by the failure to deliver a telegraph message are proper elements of damage in an action against the telegraph company by the person injured, and constitute grounds for recovery, though no pecuniary loss is shown." Telegraph Co. v. Newhouse, (Ind. App.) 33 N. E. 800; 3 Suth. Dam. 260, 645; 37 Cent. Law J. 61; Womack v. Telegraph Co., (Tex. Civ. App.) 22 S. W. 417; Bell v. Railway Co., L. R. 26 Ir. 428; Railroad Co. v. Griffin, (Tenn.) 22 S. W. 737; Beasley v. Telegraph Co., 39 Fed. 181; Telegraph Co. v. Stratemeier, (Ind. App.) 32 N. E. 871; So Relle v. Telegraph Co., 55 Tex. 310; Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. 163; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574; Chapman v. Telegraph Co., (Ky.) 13 S. W. 880; Stuart v. Telegraph Co., 66 Tex. 580, 18 S. W. 351; Willson v. Railroad Co., (Wash.) 32 Pac. 468.

WINSLOW, J., (after stating the facts.) The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent nondelivery of a telegram, constitutes an independent basis for damages. At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. Cooley, Torts, 271; Wood's Mayne, Dam. (1st Amer. Ed.) § 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by Cooper, J., in his learned opinion in the case of Telegraph Co. v. Rogers, (Miss.) 9 South. 823, as follows: "(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case,—certainly no well-considered case,—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the supreme court of Texas, in So Relle v. Telegraph Co., 55 Tex. 308, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been followed with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the federal courts. All of these cases will be preserved in the report of this case, and the citations need not be repeated here. The question is substantially a new one in this state, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in Walsh v. Railway Co., 42 Wis. 32, that, in an action upon breach of a contract of carriage, damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action, founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case. The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule. Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, that for mental distress alone, in such a case as the present, damages are not recoverable. The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in Telegraph Co. v. Rogers, (Miss.) 9 South. 823; Connell v. Telegraph Co., (Mo. Sup.) 22 S. W. 345; Telegraph Co. v. Wood, 57 Fed. 471. See, also, Judge Lurton's dissenting opinion in Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574. In the last-named opinion the following very apt remarks are made: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves we see no such reasons. We adopt the language of Gantt, P. J., in Connell v. Telegraph Co., supra: "We prefer to travel yet awhile super antiquas vias. If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under chapter 171, Laws 1885, (Sanb. & B. Ann. St. § 1770b,) damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence or their operators, servants, or employes in receiving, copying, transmitting, or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way, new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of Candee v. Telegraph Co., 34 Wis. 471, or to effect some other object, is not a question which now arises; but it seems clear to us that, had a radical change in the law relating to the kinds of suffering which should furnish a ground of damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries to the feelings alone have been sustained in this court, and the following cases are cited: Wightman v. Railway Co., 73 Wis. 169, 40 N. W. 689; Craker v. Railway Co., 36 Wis. 657; Draper v. Baker, 61 Wis. 450, 21 N. W. 527. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous. Judgment reversed, and action remanded for a new trial.

CASSODAY, J., dissents.

MAHONEY v. BELFORD.

(132 Mass. 393.)

Supreme Judicial Court of Massachusetts.
Suffolk. March 3, 1882.

Exceptions from superior court, Suffolk county; Staples, Judge.

Action by Dennis Mahoney against Charles A. Belford for slander. Verdict for plaintiff. Exceptions by defendant. Exceptions overruled.

C. G. Keyes, for plaintiff. H. E. Swasey, for defendant.

DEVENS, J. The defendant had charged the plaintiff with stealing from his employer, F. M. Weld. He had pleaded a justification, but at the trial did not seek to establish the truth of the words alleged to have been uttered. He did endeavor, in mitigation of damages, and to show that the slander did not originate with himself, to offer testimony as to the general reputation as to the plaintiff's having, during the time he lived with Weld, and also at the time of the alleged slander, stolen from him. In such an action, evidence may be given of the general reputation of the plaintiff in those respects in which it has been assailed by alleged slander. Where one has been charged with theft, it may be shown that he was generally reputed a thief, in order thus to show that no serious injury can have been inflicted on him. Clark v. Brown, 116 Mass. 504. But what the defendant sought to prove was not the plaintiff's general reputation, which was the general character he had gained in the community by his course of life, but what was the common rumor as to a particular transaction, namely, his having stolen from Weld. The defendant sought to show, not that the plaintiff's general reputation was bad, but that in a single instance he was generally reputed to have behaved badly. This would have been to have proved the common talk as to an individual subject of scandal. A general report that the plaintiff is guilty of the particular crime with which he was charged cannot be received in evidence in mitigation of damages. Alderman v. French, 1 Pick. 1; Bodwell v. Swan, 3 Pick. 376; Clark v. Munsell, 6 Metc. (Mass.) 373; Stone v. Varney, 7 Metc. (Mass.) 86; Peterson v. Morgan, 116 Mass. 350.

Upon the question of damages the court instructed the jury "that they might consider the injury, if any shown, to the mental feelings of the plaintiff, which was the natural and necessary result of the words used, if in fact they were used as alleged, and were slanderous; that mental suffering was an element of damage." This was correct. The words, if uttered at all, were uttered, as appears by the bill of exceptions, in an angry dispute at an election, in the presence of from twenty to sixty persons. While the evidence was circumstantial, and not direct, that the plaintiff had been actually damnified and had endured mental suffering in consequence, "the occasion, circumstances, manner and nature" of the alleged slander were such as warranted the plaintiff in contending that they had occasioned actual injury and mental suffering, and in seeking substantial damages therefor. "Undoubtedly," said Chief Justice Bigelow in Markham v. Russell, 12 Allen, 573, "the material element of damage in an action for slander is the injury done to character. But it is not the sole element. A jury may have a right also to consider the mental suffering which may have been occasioned to a party by the publication of the slanderous words." See, also, Marble v. Chapin, 132 Mass. 225.

Exceptions overruled.

CAHILL v. MURPHY. (No. 14,047.)

(30 Pac. 195, 94 Cal. 29.)

Supreme Court of California. March 26, 1892.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Mary Cahill against Daniel Murphy for slander. From a judgment for plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

Frank McGowan, for appellant. J. H. G. Weaver, for respondent.

FITZGERALD, C. This is an action for slander. The complaint alleges, in substance, that on or about the 21st day of September, 1889, and for a long time prior thereto, plaintiff, with her children, occupied certain rooms in an hotel of which the defendant was owner and proprietor; that one of these rooms was situated on the ground floor of the hotel, and used by her for the purpose of carrying on and conducting a general merchandising business; that on said last-mentioned date, the soot in the chimney leading from the room used as a store became ignited, causing an alarm of fire to be given; and it is further alleged, upon information and belief, that the fire was communicated to the soot in the chimney from a fire in the stove situated in said store. The slanderous words, out of which this action arose, are alleged to have been falsely and maliciously spoken by the defendant of and concerning the plaintiff, and are laid as follows: "This is twice you [the plaintiff meaning] have tried to burn us [the said hotel meaning] out to get your fourteen hundred dollars insurance. But I will report you [the said plaintiff meaning] to the insurance company to-morrow morning, and have your insurance taken away from you." It is further alleged that the defendant, by the use of these words, intended to convey the meaning that the plaintiff willfully and maliciously communicated the fire to the soot in said chimney, and that by so doing she was guilty of an attempt to commit the crime of arson, and that they were so understood by those in whose presence they were uttered, to the damage of plaintiff's character and business in the sum of $10,000. A demurrer was interposed to the complaint, which, upon the grounds stated, was properly overruled. Defendant thereupon answered, specifically denying the material allegations of the complaint, and, upon the issues thus joined, plaintiff had verdict and judgment for $1,200.

The only error complained of, which we deem it necessary to consider, relates to the ruling of the court upon defendant's objection to the following question propounded to plaintiff on her examination in chief as a witness, and after she had testified, without objection, that she had "a family of four children." "Question. How many of them are dependent upon you for support?" (Objected to on the ground that the question 'is incompetent and immaterial.' The objection was overruled by the court, and defendant excepted.) Answer. Three are dependent upon me at present." It is claimed that the effect and purpose of this testimony was to arouse the sympathies and sentimental feelings of the jury, to the prejudice of defendant's case, by the introduction of an element that did not belong to it, and which the jury could not properly consider in the assessment of damages. In Rhodes v. Naglee, 66 Cal. 681, 6 Pac. 863, the ruling of the court below permitting the plaintiff, against defendant's objection, to prove that he was a married man, and had a family, was held not to be erroneous. And in Dixon v. Allen, 69 Cal. 527, 11 Pac. 179, the mother of the plaintiff was allowed to testify as to the number of her children, their ages, and the death of her husband. The rule laid down by this court in those cases rests upon the principle (although not stated) that, as mental suffering entitled the plaintiff to compensation in cases of this character, such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon her by the slanderous charge. It was therefore competent in this case, on the question of damages, to prove the number and ages of plaintiff's children; but that they were dependent on her for support was irrelevant, and not within the issues raised by the pleadings; therefore erroneous. But was it such a material error as would justify a reversal? The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary. It was competent, as we have stated, for the plaintiff to prove the number and ages of her children, and, if it appeared from the evidence that they were minors, the presumption would be that they were naturally and legally dependent on her for support. The effect, therefore, of such evidence would be the same as if proven by direct testimony. The evidence upon which the verdict was founded shows that the slanderous words charged were spoken wantonly and maliciously. The plaintiff was therefore entitled to recover of the defendant exemplary or punitive damages, and the assessment of such damages was almost entirely in the discretion of the jury. In view, therefore, of the enormity of the charge, and the situation of the parties, the plaintiff being a defenseless woman, coupled with the amount of damages awarded by the jury as compared with the sum sued for, we are satisfied that the jury was not influenced by this evidence prejudicially to the defendant's case The verdict might well have been for a much larger sum, and yet not obnoxious to the objection that it was excessive. In this case we think the evidence immaterial, and its admission by the court a mere technical error. People v. Fick, 89 Cal. 144, 26 Pac. 759. The judgment and order should be affirmed, and we so advise.

We concur: TEMPLE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

HAYNER v. COWDEN.

(27 Ohio St. 292.)

Supreme Court of Ohio. Dec. Term, 1875.

Error to district court, Miami county.

James Murray, J. T. Janvier, and H. G. Sellers, for plaintiff in error. Conover & Craighead and Morris & Son, for defendant in error.

WRIGHT, J. The slander alleged in the petition consists in falsely charging plaintiff, a minister of the gospel, with drunkenness. It is also averred that the words were spoken of and concerning him in his ministerial profession and pastoral office. The demurrer admits all that is averred, and thus this question is raised: Are words which charge a minister of the gospel with drunkenness, when spoken of him in his profession or calling, actionable per se? We answer that they are. We understand the rule to be, that words spoken of a person tending to injure him in his office, profession or trade are thus actionable. 1 Starkie, Sland. 9; Townsh. Sland. & L. § 182; 2 Add. Torts, 957 (section 2, c. 17, Edition of 1876 of this book, has a large collection of authorities on the subject); 1 Am. Lead. Cas. 102; Foulger v. Newcomb, L. R. 2 Exch. 327; Demarest v. Haring, 6 Cow. 76.

Calling a clergyman a drunkard was held actionable in McMillan v. Birch, 1 Binney, 176; Chaddock v. Briggs, 13 Mass. 251.

Such words are actionable because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment. It is not, as counsel seem to suppose, that giving a clergyman this right of action is because his office is higher than that of his fellow men. It is a right which belongs to all who have professions or callings, and in this clergymen are not different from others.

This principle is entirely different from that upon which proceeded the cases of Hollingsworth v. Shaw, 19 Ohio St. 430; Dial v. Holter, 6 Ohio St. 228; Alfele v. Wright, 17 Ohio St. 238. In all these, the words imputed a criminal offense, and did not relate to profession or calling.

Upon the trial of the case, it was insisted by defendant that the words were not spoken of the plaintiff in his character as a minister. The court fairly left this to the jury, and said if they were not so spoken, they would find for defendant. The jury find this issue for the plaintiff, and in the face of that finding, it is impossible for us, sitting as a court of error, to say that they were not spoken of the plaintiff in his character or capacity as a clergyman. If they were as we have seen, they are actionable.

In the cases cited by defendant—Lumly v. Allday, 1 Tyrw. 217; Brayne v. Cooper, 5 Mees. & W. 249; Ayre v. Craven, 2 Adol. & E. 2; Buck v. Henly, 31 Me. 558; Redway v. Gray, 31 Vt. 292; Van Tapel v. Capron, 1 Denio, 250—it was held that the words spoken did not touch the plaintiffs in their various trades or employments. But to charge a minister with drunkenness does have such an effect. Congregations would not employ clergymen with intemperate habits, and the development of such a vice would be cause for speedy removal from office. When the question is reduced to a mere matter of dollars and cents, the purity, the integrity, the uprightness of a minister's life is his capital in this world's business.

Against the objection made, plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given is not an open question in Ohio. In Roberts v. Mason, 10 Ohio St. 277; Smith v. Pittsburg, Ft. W. & C. Ry. Co., 23 Ohio St. 10, the court allowed the jury to consider the wealth of defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. Alpin v. Morten, 21 Ohio St. 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured. This case collects the authorities on both sides of the question, to which might be added McBride v. Laughlin, 5 Watts, 375; Wagoner v. Richmond, Wright, 173; Sexton v. Todd, Id. 320; 2 Greenl. Ev. 249; 1 Am. Lead. Cas. 199, note 6; Horsley v. Brooks, 20 Iowa, 115; Buckley v. Knapp, 48 Mo. 153. We see no error in the admission of the evidence, or the charge of the court on the subject.

There are some other questions raised by counsel, to which we briefly allude:

The defendant asked the court to charge the jury: "If they find that the words spoken by the defendant of and concerning the plaintiff were untrue, and that the defendant has not reasonable cause to believe them to be true, yet, if they are satisfied from the evidence that the defendant did believe them to be true, such state of facts would not warrant a verdict for punitive or exemplary damages, but for compensatory damages only." With which request the court refused to comply, but, on the contrary, charged the jury that such was not the law, to which the defendant then and there excepted.

We do not understand the law of slander to be, that it is a defense that the slanderer believed his words to be true, when he had no grounds for so believing. Belief must have a foundation in something. Take away the foundation, and what can be left? The charge seems to us a solecism. Belief can only be claimed as a defense, or in mitigation, where it is based upon such facts or reasons as would incline a reasonable person so to believe. Inasmuch as this charge was asked in reference to exemplary damages, and there was evidence tending to show that the words had been spoken under circumstances indicating wantonness and recklessness, the charge was properly refused.

It appears to be seriously argued that in a minister of the gospel a single act of intoxication is not a fault, and therefore a charge of that kind cannot be injurious. We can hardly assent to this proposition. In a religious teacher one offense of the kind must be considered a grave departure from propriety and duty; and to say that the act has been committed is calculated to impair usefulness.

As to the question of excessive damages: The verdict was large; still we do not think defendant can complain, in view of all the circumstances of the case.

Judgment affirmed.

SCOTT, C. J., and WHITMAN and JOHNSON, JJ., concurred. DAY, J., dissented.

BENNETT v. HYDE.

(6 Conn. 24.)

Supreme Court of Errors of Connecticut. July, 1825.

Action for slander. Verdict for plaintiff. Heard on motion for new trial. Motion denied.

Cleaveland & Frost, for the motion. Goddard & Judson, opposed.

HOSMER, C. J. The evidence in a cause must be confined to the points in issue; and the character of either party cannot be enquired into, unless put in issue expressly, or by the nature of the proceeding itself. 1 Phil. Ev. 139.

In this case, conformably to the established doctrine of our courts, the character of the plaintiff was in issue. It was the object of the defendant's attack; the injury to it is the gravamen complained of; and for the vindication of it, the present action was instituted. It was said, by Chief Justice Kent, in Foot v. Tracy, 1 Johns. 46, 52: "The character of the plaintiff must be considered as coming in, at least collaterally, upon the trial;" and this court, in Stow v. Converse. 4 Conn. 42, which was an action for a libel, declared that "the plaintiff's character may be proved, because it is in issue." The plaintiff's character is not made the subject of enquiry, at the defendant's option, and shut out of view, or the subject of investigation, as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts in this state have never acceded: but they have recognized and acted on the principle, that the final object of the plaintiff's suit, is the vindication of his character; and that his reputation, of consequence, is put in issue, by the nature of the proceeding itself. The case of Rawson against Hungerford, in Middlesex county, is not merely analogous with this, but goes beyond it. In an action for the breach of a promise of marriage, the character of the plaintiff was considered to be so far in issue as to authorize the reception of evidence, in opposition to the defendant's objection,—not to sustain it from attack, but to prove its excellence.

It has been frequently adjudged, in this state, and may be considered as established law, that the plaintiff in an action of slander may prove the amount of the defendant's property to aggravate damages; and, on the other hand, that the defendant may recur to the same evidence for the purpose of mitigating them. The same rule is deducible from the law of Massachusetts (Larned v. Buffinton, 3 Mass. 546); admitting evidence in proof of the plaintiff's rank and condition, to increase the damages, or to lessen them, according as the facts should be found. It is not to be inferred, that the damages are, of course, to be proportioned to the defendant's property; but merely that property forms an item, which, in the estimate, is deserving of regard. Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence. Property, therefore, may be, and often is, attended with the power of perpetrating great damage, and, in the estimate of a jury, becomes an interesting enquiry. I am not asserting what ought to be, but what is; and that the degree of injury, necessarily, is dependent, in some measure, on the considerations before mentioned. Whether the rule that the amount of the defendant's property, in the action of slander, may be enquired into, originated solely from those principles in combination with the justice and propriety of admitting somewhat of a penal sanction, in cases, in which the most atrocious calumny is not punishable in a criminal prosecution, I do not declare. But that such rule does exist, and has uniformly been recognized in our courts, is unquestionable; and it is not the subject of regret, that the reputations of the innocent and estimable thus have an additional shield against the malice of the calumniator.

The other judges were of the same opinion. New trial not to be granted.

JOHNSON v. SMITH.

(64 Me. 553.)

Supreme Judicial Court of Maine. 1875.

Trespass by George W. Johnson against Manasseh Smith for assault and battery. Verdict for plaintiff. Heard on defendant's exceptions. Exceptions sustained.

The exceptions were as follows: "The defendant offered evidence of his property and means, as bearing upon the matter of punitive damages and in mitigation thereof. The plaintiff introduced no evidence tending to show that the defendant had any property whatever, and did not claim that the damages should be increased by reason of wealth or any pecuniary ability on the part of the defendant. The court excluded this evidence offered by the defendant, and he excepted.

"The defendant also requested the judge to instruct the jury, that, the assault and battery being acts for which the defendant was subject to prosecution and punishment by a criminal action or indictment, they would not be authorized in this case to allow anything as exemplary or punitive damages; which instruction the judge refused to give, but did affirmatively instruct the jury that the law says that, in a case of gross and malicious assault, the jury may, in their discretion, if they deem proper, award exemplary damages, but there is no rule of law by which the plaintiff can claim it as a legal right."

T. H. Haskell, for plaintiff. Nathan Webb, for defendant.

DANFORTH, J. The exception to the instruction to the jury, that "the law says that in a case of gross and malicious assault, or of gross and aggravated injury, the jury may, in their discretion, if they deem proper, award exemplary damages, but there is no rule of law by which the plaintiff can claim it as a legal right," must be overruled. Such law has become so well settled in this state, even in cases where the defendant is also liable to criminal prosecution, not only by the decided cases, but also by a uniform and in point of time a somewhat extended practice in our courts, that it is now too late to disturb it, unless by legislative enactment. Goddard v. Railway Co., 57 Me. 202, and cases there cited. Besides, to allow the exception contended for, and permit the plaintiff to recover exemplary damages for injury to his property, and refuse it under similar circumstances for an injury to his person, would introduce a greater inconsistency and render the law more unsymmetrical than is now claimed for it.

The other exception must be sustained. It does not clearly appear whether the testimony offered would have tended to show defendant's general reputation as to property or his actual condition in that respect. In either event, it should have been received, as it was pertinent to the issue. So far as the cause of action rests upon an injury to the character, or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful acts the greater. Humphries v. Parker, 52 Me. 507, 508; 2 Greenl. Ev. § 269. But in such cases, as it is rather the reputation for, than the possession of, wealth, which is the cause of this increased rank, the testimony must correspond, and only the general question as to his circumstances can be asked, and not the detail. Stanwood v. Whitmore, 63 Me. 209.

But when exemplary damages are claimed, a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger. McBride v. McLaughlin, 5 Watts, 375. Upon this point actual wealth could only be material. As bearing upon this point the testimony was offered and excluded. This took from the jury an element proper for their consideration.

It is true the plaintiff offered no proof upon this point and claimed no damages by reason of defendant's "wealth or pecuniary ability;" but if it was competent for the plaintiff to prove defendant's wealth to increase his damages, it was equally competent for the defendant to show a want of it to diminish them; and the waiving of the right by the one, is no reason why it should be taken from the other. Nor does the mere non-claim of damages on that ground, the right to punitive damages being still insisted upon, take it from the consideration of the jury. Hence the exclusion of the testimony left them in darkness where they were entitled to light. If the plaintiff really intended to admit that the defendant was without means, the testimony could have done him no harm; but such an admission was not distinctly made, and in the absence of it, the exclusion of the testimony would be injurious to the defendant. It certainly deprived him of a legal right.

Exceptions sustained.

APPLETON, C. J., and WALTON, BARROWS, and PETERS, JJ., concurred.

BECK v. DOWELL.

(20 S. W. 209, 111 Mo. 506.)

Supreme Court of Missouri, Division No. 2. Sept. 20, 1892.

Appeal from circuit court, Lewis county; Benjamin E. Turner, Judge.

Action by Jennie Beck, by her next friend, Oliver Beck, Sr., against Elijah Dowell, executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Blair & Marchand and M. McKeag, for appellant. Clay & Ray, F. L. Schofield, and J. C. Anderson, for respondent.

GANTT, P. J. This cause was appealed from the circuit court of Lewis county to the St. Louis court of appeals. That court, in an opinion by Judge Rombauer, affirmed the judgment of the circuit court, (40 Mo. App. 71;) but Judge Biggs being of the opinion that the conclusion reached by the majority, that evidence of the financial condition of the plaintiff, in an action when the evidence will justify the jury in awarding exemplary or punitive damages, was admissible, is in conflict with and opposed to two decisions of this court, to wit, Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, and Stephens v. Railroad Co., 96 Mo. 207, 9 S. W. 589, the cause was, under the constitution, certified to this court.

1. When the cause was heard in the court of appeals, the instructions were not in the record. No efforts were made to supply them in that court, and that court rightly proceeded on the assumption that the trial court had correctly declared the law to the jury. Since the case has reached this court, a certified copy of the instructions has been filed with the record. The propriety of considering these declarations of law by this court, under these circumstances, suggests itself at once. While this court obtains jurisdiction to "rehear and determine a cause so certified to us by either of the appellate courts, as in cases of jurisdiction obtained by ordinary appellate process," there is nothing in the constitution that justifies parties in assuming that we will or can take cognizance of matters not in the record. When a record is deficient in any material respect, the practice is uniform that the party desiring the absent record should suggest the diminution, and apply for a writ of certiorari, or file stipulations in this court, supplying the record. In this case nothing of the kind has been done, but from the brief of the appellant, we take it he assumes that these instructions are properly before us. There is no hardship in requiring parties to govern themselves by the rules of procedure, established for the disposition of causes. For the purposes of this appeal, these instructions are no part of the record, and the cause will be determined on the presumption that the trial court correctly instructed the jury. Parties must pursue legal methods in perfecting their transcripts, and in the proper courts, and in proper seasons.

2. The point in this record, then, is that upon which the court of appeals divided. Is evidence of the financial condition of the plaintiff admissible in an action for damages, when there are circumstances of oppression or malice? That exemplary damages may be recovered in actions for trespass or personal torts accompanied by circumstances of malice or oppression is no longer open to question in this state. Buckley v. Knapp, 48 Mo. 152. Nor is it controverted that it is perfectly competent to show the financial ability of the defendant in such a case. The case of Stephens v. Railroad Co., 96 Mo. 214, 9 S. W. 589, was an action for compensatory damages alone, and the learned judge who wrote the opinion expressly says: "There is nothing in the case to justify the giving of exemplary damages, and the damages should be confined to compensation for the injuries sustained." The case of Overholt v. Vieths, 93 Mo. 422, 6 S. W. 74, had no element in it justifying exemplary damages, and this court held that it was not improper to exclude evidence of the mother's financial condition in a suit for the death of her child which had been drowned in a pond, "in view of the fact that she had been allowed to state her condition in life, and that she did her own housework and had no servant." We do not think either of these cases can be considered as decisive of the point in this case. Exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender. Franz v. Hilterbrand, 45 Mo. 121; Callahan v. Caffarata, 39 Mo. 137. The evidence in this case tended to show that the plaintiff was a girl about 16 years old; that her father was a tenant of defendant; that on the day she was shot by defendant her father and his sons were trying to water a cow in a lot of the defendant; that a difficulty ensued, —a general fight; that she was standing in the lot looking on, unarmed, when the defendant turned upon her, and shot her through the thigh. In other words, the defendant, with a deadly weapon, shot an unarmed girl without lawful provocation. We think there was ample evidence from which the jury could find willful, wanton injury. In 1 Suth. Dam. p. 745, it is said: "In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts. These embrace the res gestæ and the age, sex, and status of the parties; this, whether the case be one for compensation only, or also for exemplary damages, when they are allowed." In Bump v. Betts, 23 Wend. 85, the supreme court of New York, on a question of excess-

ive damages, pointed to the fact that the defendant had the command of great wealth, and that the plaintiff was a poor man. In McNamara v. King, 7 Ill. 432, in an action for assault and battery, the court permitted the plaintiff to show he was a poor man with a large family. The supreme court of Illinois, in affirming that ruling, said: "We are also of the opinion that the circuit court decided correctly in admitting the evidence and giving the instruction. In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages. Their pecuniary circumstances may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured." In Grable v. Margrave, 4 Ill. 372, in an action for seduction, the trial court admitted evidence to show plaintiff was a poor man. The supreme court, on appeal, said: "The court therefore decided correctly in admitting evidence showing the pecuniary condition of the plaintiff. This evidence does not go to the jury for the purpose of exciting their prejudices in favor of the plaintiff because he is a poor man, but to enable them to understand fully the effect of the injury upon him, and to give him such damages as his peculiar condition in life and circumstances entitle him to receive." In Gaither v. Blowers, 11 Md. 536, in an action for assault and battery, the trial court having admitted evidence for the plaintiff, with a view of increasing his damages, that he was a laboring man and had a wife and children to support, the supreme court, after quoting the language of McNamara v. King, 7 Ill. 432, says: "This is good sense, and is sustained by the decisions in most of the states. An injury done to a person not dependent on manual labor for the support of himself and family is in no wise as great as one to a person so situated." In Reed v. Davis, 4 Pick. 215, the supreme court of Massachusetts, in an action for trespass in forcibly evicting plaintiff from his home, says: "One of the defendants stated to a witness, in answer to his inquiry whether he thought the plaintiff could not make him suffer, that 'the plaintiff had been to jail, and sworn out, and was not able to do anything.' Now, that circumstance was to be taken into consideration by the jury. There is nothing more abhorrent to the feelings of the subjects of a free government than oppressing the poor and distressed under the forms and color, but really in violation, of the law." "It is found that the dwelling house was small, but the damages are not to be graduated by the size of the building. The plaintiff also was poor. He had seen better days, but had been reduced in his circumstances. He was thought not to be able to do anything in vindication of his rights at the law." In Dailey v. Houston, 58 Mo. 361, this court said: "It is next insisted that the court improperly told the jury that, in the estimation of damages, they might take into consideration the 'condition in life of plaintiffs, and their pursuits and nature of their business.' There is no doubt but that, in estimating damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness, or atrocity or want of atrocity, in the transaction, and which tend to characterize the assault." This decision of Judge Vories was concurred in by all the judges. It has never, to our knowledge and so far as we can ascertain, been questioned, denied, or criticised. It is in harmony, as we have seen, with the decisions of other courts of great ability. It is in harmony with the tendency of the courts to place before the triers of facts, whether court or jury, every fact that will aid them in arriving at a correct verdict. It is evident in this case its effect was not to create prejudice or passion. There is nothing that smacks of either in the verdict. Accordingly we affirm the judgment of the court of appeals, as indicated by the opinion of the majority of the judges of that court, on this as well as all other points ruled in the case, and it will be so certified to that court.

All concur.

GOLDSMITH'S ADM'R v. JOY.

(17 Atl. 1010, 61 Vt. 488.)

Supreme Court of Vermont. Bennington. June 13, 1889.

Exceptions from Bennington county court; Powers, Judge.

Trespass for an assault and battery, committed on one Goldsmith, brought by Goldsmith's administrator against Moses Joy, Jr. Defendant did not deny that he made the assault. It appeared, however, that at the time, and just before, hot words had passed between the parties, and defendant claimed that he committed the wrong under the influence of the passion induced by the insulting and unjustifiable language of plaintiff's intestate, and that this fact should be considered by the jury in reduction both of the actual and exemplary damages. Defendant was the superintendent and general manager of the construction of a system of waterworks in the city of Bennington, and in that capacity had in his employ about 100 men, mostly or all foreigners. It was in reference to the treatment of these men by defendant that the intestate used the alleged insulting language. He was suffering from Bright's disease at the time of the affray, and subsequently died of it. It was claimed that his death was materially hastened by the assault.

The court instructed the jury to award plaintiff actual damages at any rate, no matter what the provocation which led to the assault might have been. Upon the subject of exemplary damages the charge was as follows: "Now, then, as to the other question of damages. In actions of this kind under the laws of this state, the jury is permitted (not compelled, but permitted) in their discretion to allow to the plaintiff, in addition to the ordinary compensatory damages, such damages as in their judgment the character of the assault requires, in order that their verdict may serve as a terror to evil-doers. This is called 'exemplary damages,'—damages that are awarded by way of example; a verdict that the community can look upon as the wise judgment of the jury, exercised in a case where it will be calculated to restrain attacks of this kind in the future. I have said, gentlemen, that the allowance of the damages is permitted to the jury. They are not awarded in any case unless the trespass—unless the assault and battery—was of such a wanton, malicious, or aggravated character as leads the jury to think that an example ought to be made of the case. Oftentimes an assault is committed by one man upon another under such circumstances that the jury can see honestly that there was no malice; that there was no wantonness; that there were no high-handed acts that would justify the awarding of more than compensatory damages. On the other hand, many cases exist where the attack is of a wanton character, where it is inexcusable, where it is of a high-handed nature, and the jury, looking at all the facts in the case, wisely say that the public are entitled to have an example made in the particular case, in order that in the future not only the defendant himself, but that other persons who get into affrays, shall be restrained from making these high-handed, inexcusable, and wanton attacks upon another. So that, gentlemen, this question, then, is one that addresses itself to your wise discretion. Do you think, in view of what is shown here, that this attack was of such a character as warrants you in awarding exemplary damages? If you do, then the amount of these damages rests wholly in your wise discretion. Whether it shall be a small sum or a large sum, you are to judge of; but in any event, gentlemen, if you award damages of this nature, you are to do it because you think that this assault upon Mr. Goldsmith was, under the circumstances, wholly inexcusable and wanton on the part of the defendant. Now, then, in respect to that question, mere words made use of by one person to another are no legal excuse whatever for the infliction of personal violence. It makes no difference how violent the language used may be, no man has the right to use personal violence upon another when he is induced to simply by the use of words. That is no defense to the action. But when you come to the question of whether a particular case is one that deserves the awarding of exemplary damages, then you are to consider all the circumstances in the case; the provocation, if any, that the defendant had; and everything that is calculated on the one hand to aggravate his act, and on the other hand to palliate his act, is to be considered. As I have already said on the main question of compensatory damages, there is no defense here whatever. No matter what was said, no matter how much provocation the defendant had, he is bound to answer for the compensatory damages, at any event. As to exemplary damages, in the exercise of a wise discretion you will not allow them unless you are satisfied that the act of the defendant was high-handed, wanton, and inexcusable, and in determining that question you are to take into view all the provocation that he had. Now, then, gentlemen, if the provocation was slight, it is quite different, and it should have less weight in determining the question whether you shall award exemplary damages than it would have if the provocation was great. Then, again, you may look at the parties themselves. If Goldsmith was a feeble old man, in poor health, and physically unable to compete with the defendant in a personal encounter, and the defendant without any provocation that you in your judgment say warrants an assault,—a violent assault,—if he then makes an assault that is altogether undue, uncalled for, in view of the special circumstances existing, why, then, it would be a case that the jury might award exemplary damages. The law takes notice of the hot passions that people fall into when they are engaged in disputes, not by way of making a complete defense to an action for damages, but by way of raising a doubt in the minds of the jury respecting the awarding of exemplary damages. And in determining that question the jury are justified in looking at the parties as they stand before them. Take an ignorant class of men that we have in every community,—men who have by their education and bringing up had less opportunities to come within the circle of good order and of good behavior,—the jury might well say that as to that class of men, if they fall into disputes and come to blows, there would be less occasion for setting an example than there would be if the parties occupied a higher and more prominent position in society. The influence of an example in a case of this kind oftentimes depends quite largely upon the character of the parties involved. You can cast about you in your mind's eye, in the community, and pick out men who, if they should fall into an affray of this kind, would draw away very far from the moorings of good citizenship and good behavior, and then an example would be demanded, if one inflicted an assault upon another." Verdict and judgment for plaintiff. Exceptions by defendant.

Martin & Archibald, J. L. Martin, and J. C. Baker, for plaintiff. Batchelder & Bates and W. B. Sheldon, for defendant.

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that, no matter how great the provocation, the defendant was bound in any event to answer for these damages. It is a general and wholesome rule of law that whenever by an act which he could have avoided, and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured. The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion. The English cases lay down the general rule that provocation may mitigate damages. The case of Fraser v. Berkeley, 7 Car. & P. 621, is often referred to, in which Lord ABINGER held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; "that it would be an unwise law if it did not make allowance for human infirmities; and, if a person commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation." TINDAL, C. J., in Perkins v. Vaughan, 5 Scott, N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that, where it does not amount to a defense, it may be given in mitigation of damages." Linford v Lake, 3 Hurl. & N. 275; 2 Add. Torts, § 1393, recognizes the same rule. In this country, 2 Greenl. Ev. § 93, states the rule that a provocation by the plaintiff may be thus shown, if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are Cushman v. Ryan, 1 Story, 100; Avery v. Ray, 1 Mass. 12; Lee v. Woolsey, 19 Johns. 319; and Maynard v. Beardsley, 7 Wend. 560. The supreme court of Massachusetts has generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind. Mowry v. Smith, 9 Allen, 67; Tyson v. Booth, 100 Mass. 258; and Bonino v. Caledonio, 144 Mass. 299, 11 N. E. Rep. 98. It is also said in 2 Sedg. Dam. (7th Ed.) 521, note: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this that where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so, the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is practically mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure." In Burke v. Melvin, 45 Conn. 243, PARK, C. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damage the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a provoked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damage, while the damage in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In Bartram v. Stone, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See, also, Richardson v. Hine, 42 Conn. 206. In Kiff v. Youmans, 86 N. Y. 324, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. DANFORTH, J., said: "It still remains that the plaintiff provoked the trespass; was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, * * * and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them." In Robison v. Rupert, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages." In Ireland v. Elliott, 5 Iowa, 478, the court said: "The furthest that the law has gone, and the furthest that it can go, while attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages." In Thrall v. Knapp, 17 Iowa, 468, the court said: "The clear distinction is this: Contemporaneous provocations of words or acts are admissible, but previous provocations are not. And the test is whether 'the blood has had time to cool.' * * * The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand, the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace, that, 'if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little *diachylon*, yet he shall have his action.' Per Lord HOLT, Ashby v. White, 2 Ld. Raym. 955." The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In Morely v. Dunbar, 24 Wis. 183, DIXON, C. J., held "that, notwithstanding what was said in Birchard v. Booth, 4 Wis. 75, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal." But in Wilson v. Young, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings; DIXON, C. J., however, adhering to the rule in Morely v. Dunbar that it might go to reduce all compensatory damages. But in Fenelon v. Butts, 53 Wis. 344, 10 N. W. Rep. 501, and in Corcoran v. Harran, 55 Wis. 120, 12 N. W. Rep. 468, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of punitory, but not of actual damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault. In Donnelly v. Harris, 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. WALKER, C. J., in delivering the opinion of the supreme court, remarked: "Had this modification been limited to exemplary damages, it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then to say they may mitigate all but nominal damages, would, we think, be doing by indirection what has been prohibited from being done directly. To give to words this effect would be to abrogate, in effect, one of the most firmly established rules of the law." See, also, Ogden v. Claycomb, 52 Ill. 366. In Gizler v. Witzel, 82 Ill. 322, the court said, in reference to the charge of the court below: "The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense." In Norris v. Casel, 90 Ind. 143, this precise question was not raised, but the court said, in reference to the instructions of the court below, that the first part of the charge, that the provocation by mere words, however gross and abusive, cannot justify an assault, was correct, and that a person who makes such words a pretext for committing an assault commits thereby not only a mere wrong, but a crime, and the person so assaulted is not deprived of the right of reasonable self defense, even though he used the insulting language to provoke the assault against which he defends himself; but, whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault. Johnson v. McKee, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The supreme court said: "In regard to provocation, the court charges, in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words, he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called 'exemplary damages.' As there is no case in which a party who is damaged, and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain it was not the defendant." The court said in Prentiss v. Shaw, 56 Me. 436: "We understand that rule to be this: A party shall recover as a pecuniary recompense the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. * * * If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property must pay all the damages to such person or property, directly and actually resulting from the illegal act? * * * Where the trespass or injury is upon personal or real property, it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, * * * must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other mitigation of the damages claimed, but he holds the law to be that mitigant circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act. In a learned article on "Damages in Actions ex Delicto," 3 Amer. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd (even without resorting to the definition of damages) to say that they shall be for a part only of the injury." "It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages." Jacobs v. Hoover, 9 Minn. 204, (Gil. 189;) Cushman v. Waddell, Baldw. 57;[1] and McBride v. McLaughlin, 5 Watts, 375,—are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that unless the plaintiff has given the defendant a provocation amounting in law to a justification he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum, and thus practically justify an assault and battery. But why, under this rule, may they not fully justify? If, in one case, the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant, and thus overturn the well-settled rule of law that words cannot justify an assault. On the other hand, if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words, and therefore, though he struck and injured the plaintiff, he was only partly in the wrong, and should pay only part of the actual damages. If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question; but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another, unless done in self-defense, or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in Howland v. Day, 56 Vt. 318, that "the law abhors the use of force either for attack or defense, and never permits its use unnecessarily." Exemplary damages are not recoverable as matter of right, but as was stated by Wheeler, J., in Earl v. Tupper, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character. Boardman v. Goldsmith, 48 Vt. 403, and cases cited; Mayne, Dam. 58–65; Voltz v. Blackmar, 64 N. Y. 440. The instructions to the jury upon this branch of the case were in substantial accordance with the law as above stated. As exemplary damages were awardable in the discretion of the jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved. We find no error in the charge, and the judgment is affirmed.

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[1] Fed. Cas. No. 3,516.

WARD v. BLACKWOOD.[1]

(41 Ark. 295.)

Supreme Court of Arkansas. Nov. Term, 1883.

Appeal from circuit court, Faulkner county; J. W. Martin, Judge.

Massey sued Ward in an action ex delicto. His complaint contained two paragraphs—one for assault and battery, and the other for malicious prosecution in having him arrested. After the issues had been made up, the plaintiff died. Mr. Blackwood qualified as his administrator, and the action was revived in his name and proceeded to a trial, which resulted in a verdict against Ward for two thousand dollars damages. Ward excepted to the revivor in the name of the personal representative, and afterwards moved the court to arrest the judgment and to grant him a new trial for this alleged error. Reversed.

R. C. Newton and Henderson & Caruth, for appellant. W. L. Terry and Blackwood & Williams, for appellee.

SMITH, J. * * * * * * * * * * *

The court gave the following direction to the jury: "If the assault was committed without fault on the part of the plaintiff in a wanton and willful manner, and under circumstances of outrage, cruelty and oppression, or with malice, they will be warranted in finding vindictive or exemplary damages by way of punishment and for public example."

And it refused to give this: "If you find from the evidence that Massey was employed by or for Ward, for the purpose of guarding convicts, and that some of them escaped through the carelessness or negligence of said Massey, or through his connivance, and that Ward believed he had so acted, although said belief or opinion will not justify the assault, it may be considered in mitigation of damages."

The action of the court in these particulars was excepted to, and was urged in support of the motion for a new trial. And it was also claimed that the damages were excessive. The defendant was the lessee of the penitentiary. The plaintiff was employed as a guard, and was especially instructed to be vigilant and never permit a convict to come nearer him than twenty-five yards. He was not a man of strong constitution and was in rather feeble health. He seems to have fallen asleep on his post about ten o'clock in the morning, and three convicts, taking advantage of his condition, disarmed him and made good their escape. They were fired upon by the other guards, and in the midst of the commotion the defendant came into the yard, and being enraged at the escape of the convicts, seized a clapboard, and struck the plaintiff three or four times over the shoulders and back.

This does not impress us as a proper case for the infliction of exemplary damages or smart money. An employer who, in a fit of passion, assaults his servant for a neglect of duty, thereby commits a breach of the peace and an actionable wrong. But if, making due allowance for the infirmities of human temper, the defendant has a reasonable excuse, arising from the provocation or fault of the plaintiff, but not sufficient to justify entirely the act done, then damages ought not to be assessed by way of punishment and the circumstances of mitigation should be considered.

For the public offense, Massey swore out a warrant, upon which Ward was arrested, arraigned, pleaded guilty, and fined $10 and costs and paid the same. For the private injury this action is prosecuted. And the elements of damages are, the personal indignity involved in the assault, the plaintiff's bodily pain, and suffering, loss of time and labor, and diminished capacity to work from the date of the assault to Massey's death, and the expenses of medical and surgical attendance during his illness consequent upon the injuries received.

Cushman v. Waddell, 1 Baldw. 59, Fed. Cas. No. 3,516, was an action by a schoolmaster against a parent for a severe beating. The plaintiff had punished one of his pupils for some offense. The father went to the plaintiff's boarding-house, attacked and beat him savagely, accompanied by very intemperate and vindictive language and other circumstances of aggravation. The court held that no provocation could excuse the defendant from making compensation for all the injury the plaintiff had suffered by the unlawful attack. But if the jury were satisfied that, without any previous malice towards the plaintiff, or any deliberate design to injure him in person or in the estimation of the public, the defendant acted in the heat of passion, caused by the appearance and accoun' of his son, it was a circumstance which ougn(to operate powerfully to reduce the damages to such as were compensatory.

In the case under consideration, there was no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a certain recklessness. Ward had never seen Massey before. And Massey was very far from being free from fault.

For the errors above indicated, the judgment is reversed, and a new trial is awarded.

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[1] Portion of opinion omitted.

SICKRA v. SMALL et al.

(33 Atl. 9, 87 Me. 493.)

Supreme Judicial Court of Maine. May 4, 1895.

Exceptions from supreme judicial court, York county.

Action on the case for libel by Raymond Sickra against Josephine W. Small and another. Plaintiff had judgment for nominal damages only, and brings exceptions. Exceptions sustained.

G. F. Haley, for plaintiff. E. J. Cram, for defendants.

WHITEHOUSE, J. This was an action of libel for defamatory matter, published in a newspaper, representing that the plaintiff and Mrs. Blake had "eloped," and were living together in adultery.

At the trial, evidence was offered by the defendant, and admitted by the court, subject to the plaintiff's right of exception, that the plaintiff's "general character" was bad in the community in which he lived.

1. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge.

While there has been some contrariety of opinion, or at least of expression, upon this question, it must now be regarded as settled, both upon principle and the great weight of authority, that, in this class of cases, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. Stone v. Varney, 7 Metc. (Mass.) 86; Leonard v. Allen, 11 Cush. 241; Bodwell v. Swan, 3 Pick. 376; Clark v. Brown, 116 Mass. 505; Root v. King, 7 Cow. 613; Lamos v. Snell, 6 N. H. 413; Bridgman v. Hopkins, 34 Vt. 533; Eastland v. Caldwell, 2 Bibb, 21; Powers v. Cary, 64 Me. 1; Odgers, Sland. & L. 304; Suth. Dam. 679; Best, Ev. 256; 1 Whart. Ev. 53; 2 Starkie, Sland. 87; 1 Greenl. Ev. § 55; 2 Greenl. Ev. § 275.

In Stone v. Varney, supra, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence, in mitigation of damages, that "the general reputation of the plaintiff in the community, as a man of moral worth," was bad. After a careful examination of the authorities touching the question, the court say, in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. * * * It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. Lord Ellenborough, in 1 Maule & S. 286, says, 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.'"

In Leonard v. Allen, supra, the plaintiff was charged with maliciously burning a schoolhouse, and it was held that, in the introduction of evidence to impeach the character of the plaintiff, in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of Clark v. Brown, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule, laid down in Stone v. Varney and Leonard v. Allen, supra, that it was competent for the defendant to prove, in mitigation of damages, that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In Lamos v. Snell, 6 N. H. 413, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man, or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff * * * in mitigation of damages, and for this inquiry the plaintiff must stand prepared."

In Eastland v. Caldwell, supra, the court say, in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. * * * In this case, the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opinion he ought to have been permitted to inquire into his general moral character, without relation to any particular species of immorality; for a man who is habitually addicted to every vice, except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages if they are permitted only to know the plaintiff's general character in relation to the facts put in issue."

With respect to the form of the inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides. Chamb. Best, Ev. 256, note. It would seem, therefore, that, in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge of the plaintiff's general reputation in the community, either as a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

2. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction."

This request was doubtless suggested by the note to section 275, 2 Greenl. Ev., which appears to be based on the old case of Earl of Leicester v. Walter, 2 Camp. 251. But that case has long ceased to be recognized as authority for anything more than the admission of evidence of the plaintiff's general reputation. A similar intimation is found in Larned v. Buffinton, 3 Mass. 353, but in Aldermen v. French, 1 Pick. 18, this dictum is declared to be unsupported by any authority. Again, in the later case of Watson v. Moore, 2 Cush. 134, it was held incompetent for the defendant, in an action of slander, to prove, in mitigation of damages, "circumstances which excited his suspicion, and furnished reasonable cause for belief on his part, that the words spoken were true." The obvious objection to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken, and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. Powers v. Cary, supra; Mapes v. Weeks, 4 Wend. 659; Stone v. Varney, supra. A fortiori, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose. Watson v. Moore, supra.

This instruction to the jury must, therefore, be held erroneous; and for this reason the entry must be:

Exceptions sustained.

HASKELL, J., concurred in the result.

CALLAHAN v. INGRAM.

(26 S. W. 1020, 122 Mo. 355.)

Supreme Court of Missouri, Division No. 1.
May 28, 1894.

Appeal from circuit court, Jackson county; R. H. Field, Judge.

Action by Thomas F. Callahan against D. R. Ingram for slander. Judgment for plaintiff, and defendant appeals. Reversed.

Thompson & Wilcox, for appellant. Harmon Bell and Wash Adams, for respondent.

MACFARLANE, J. Action for slander. The petition charged that on the 4th of November, 1889, plaintiff was appointed superintendent of streets of Kansas City, which was an office of honor and trust, under the charter and ordinances of said city; that on said date, at a meeting of the common council of said city, in the presence of divers persons (naming other members of said council, and the clerk thereof, and other persons), then present, defendant "falsely and maliciously spoke and published of and concerning the plaintiff the false and malicious words following, to wit: 'Now, I want to say something, and I want the reporters to get it. The superintendent of streets—this Callahan—is a downright thief, and I can prove it.'" The petition further charged that at the time the words were spoken there was not then pending before said council any ordinance, motion, resolution, or report referring to plaintiff, or the office so held by him; "that defendant meant and intended, by the use of said words so spoken and published by defendant as aforesaid, to charge plaintiff with being guilty of willful, corrupt, and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity, as such superintendent of streets, or under color of his said office. Plaintiff further states that at the time said words were so spoken by defendant the defendant well knew the same to be false, and said words were so spoken by defendant wantonly and maliciously, and with the intention of injuring plaintiff; that the words spoken were false, and plaintiff was greatly injured in said office, and in his feelings, good name, and reputation." The answer was a general denial, and a special plea as follows: "For a second and further answer to plaintiff's amended petition, defendant says that, at the time the supposed defamatory words were spoken by defendant, the lower house of the common council of Kansas City, being regularly in session, were discussing the office of superintendent of streets, and the actions and methods of Superintendent Callahan, the plaintiff. It had been stated by different members of the council that he was an inefficient and incompetent officer, and had been guilty of misconduct, oppression, partiality, and abuse of authority, in his official capacity. During this discussion the defendant, in the discharge of his duty as a member of said common council, in discussing the official conduct of plaintiff, stated that the resolution previously introduced by him to investigate the city officials was aimed at Superintendent Callahan; that said Callahan, in his official position, as inspector of curbing, had condemned curbing that was being put in by one party, and permitted another man, a favorite of said superintendent, to put in the same stone, entailing loss on the first man, and bestowing official favors on the second; that he had also given acceptances for curbing put in by one man to another, knowing at the time he gave the acceptances that the person to whom he gave them had not done the work, and was not entitled to them, thus enabling the second man to collect pay for work done by the first, and defrauding one man to put money into the pocket of a favorite of said Callahan. Defendant, in stigmatizing such conduct as dishonorable and dishonest, applied the term 'downright thief,' to said superintendent. Defendant says that this statement was made in the discharge of his official duty, as above set forth, and without malice or ill will to plaintiff, and that he had good reason to believe, and did believe, that the statements he made were true, and that the opprobrious epithet he used was a just and fair characterization of such official misconduct. Defendant further states that the circumstances above referred to are as follows: In June, 1887, John Henry had a private contract to put in about 82 feet of curbing for F. J. Baird on Twentieth street, between Southwest boulevard and Broadway; that said Henry did said work, and put in said curbing, and said Callahan, though knowing that said Henry had done said work, issued acceptances to one Bashford; that, in the fall of 1887, Johnson and Tompkins were putting in curbing on Sixteenth street, between Penn and Broadway, and that they got the curbing of Richard Cummins; that said Callahan condemned some of said stone, and said Cummins sold it to one Bashford, and Callahan allowed him to use it for curbing on another street." The reply was a general denial.

The evidence showed that plaintiff was on the 4th day of November, 1889, superintendent of streets, and defendant was a member of the city council; that defendant had previously held the office of inspector of curbing and sidewalk construction; that, some time previously, defendant had introduced in the lower house of the council, of which he was a member, a resolution bearing on plaintiff's official conduct, which had passed that house, and gone to the upper house, where it then remained undisposed of. On this occasion a member raised a question of privilege, and a general discussion and criticism of plaintiff's official conduct followed, in which defendant spoke the words attributed to him, making special reference in what he said to the alleged misconduct set up in his special plea. At the time no resolution, ordinance, motion, or report was before that house, respecting plaintiff, or his official conduct. On the trial, defendant offered to prove that those present, who heard defendant's language, understood it to refer to official misconduct of plaintiff in the matters referred to. He also offered to prove the reasons and motives which induced him to speak of plaintiff as he did. These offers were refused by the court. Defendant, in support of his special plea, undertook to prove that, while plaintiff was inspector of curbing, he issued to one party a certificate for curbing put in by another. Under the ordinances, the engineer was required, after completion of work by the owner of the property charged therewith, to grant a certificate of the fact, which, when filed, exonerated the owner from liability to pay for the improvement. Defendant offered in evidence a certificate of that character, which showed that the measurement had been made by plaintiff as inspector, but without designating who had done the work. The court refused to permit this certificate to be read in evidence.

At request of plaintiff, the court gave the jury the following instructions: "(1) The jury are instructed that if they believe from the evidence that on November 4, 1889, the plaintiff was acting as superintendent of streets of Kansas City, and that defendant, Ingram, was a member of the common council of Kansas City, and at a meeting of the lower house of the common council, and in the presence of various people, the defendant maliciously used the following language of and concerning the plaintiff in his character of superintendent of streets, namely: 'Now, I want to say something, and I want the reporters to get it. This superintendent of streets—this Callahan—is a downright thief, and I can prove it,'—and if the jury further believes that said language was false and untrue, then the said jury should find for the plaintiff. (2) Malice does not consist alone in personal spite or ill will, but it exists, in law, wherever a wrongful act is intentionally done without just cause or excuse. (3) The court instructs the jury that the defendant is not protected in this action from liability for the words used by him against plaintiff by reason of having uttered them in the chamber of the lower house of the common council of Kansas City. (4) The jury are instructed that, in making their verdict, they may take into consideration all the facts and circumstances as detailed by the witnesses; and if the jury find for plaintiff, in estimating the damages which they may think plaintiff has sustained, the jury may take into consideration, and allow the plaintiff for, the mortification to his feelings, suffered from the act of defendant complained of, and may add thereto, as punitive damages, such amount as will adequately punish the defendant for such act, and serve as a warning to prevent others from being guilty of a like act." The court gave one instruction for the defendant, as follows: "(11) The jury are instructed that if they believe from the evidence that the remarks of defendant at the council meeting on the 4th of November, 1889, in reference to plaintiff, taken as a whole, in their import, referred to him as inspector of curbing, and not as superintendent of streets, then your verdict should be for the defendant." The judgment was for plaintiff, for $5,000, and defendant appealed.

1. Defendant admitted speaking the words imputed to him, but undertook to justify what he said on the ground that he was at the time a member of the city council of Kansas City, which was in regular session, and had under discussion the office of superintendent of streets, and the official action and methods of plaintiff, who was then such superintendent; that, in the discharge of his official duty, he had the right and privilege to discuss and characterize the official misconduct of plaintiff. There can be no doubt, on proper occasion, members of the city council would be protected from "responsibility for whatever is said by them, which is pertinent to any inquiry pending or proposed before them," but no further. They would become "accountable when they wander from the subject in hand to assail others." Cooley, Torts, 214; Neeb v. Hope, 111 Pa. St. 152, 2 Atl. 568. Members of the city council, in particular, and all citizens, in general, are interested in the proper, honest, and efficient administration of the public service, and have the right, in the public interest, to criticize public officers, and to prefer charges for malfeasance or neglect of duty, if done in good faith, upon probable and reasonable grounds; but the law does not permit any person to slander another, on any occasion or under any circumstances, when he is not protected by absolute privilege. It is charged in the petition, and conclusively shown by the evidence, that when the objectionable words were spoken there was no inquiry pending or proposed before that house of the council, which would make the occasion one of privilege, beyond that which is accorded to every citizen. Defendant was not privileged to falsely characterize the plaintiff as a "thief," though the term was intended to apply to his official conduct. Whether the occasion is such as to make the communication one of privilege is always a question of law for the court, where there is no dispute as to the circumstances under which it was made, and the court did not err in holding that the language applied to defendant was not privileged. Newell, Defam. p. 391, § 9; Odger, Sland. & L. 183; Am. & Eng. Enc. Law, 406. The words spoken were actionable in themselves, and, being admitted by the answer, the court properly instructed the jury that if they were false the defendant was liable.

2. Complaint is made of the first instruction given for plaintiff, in that it is an abandonment of the meaning plaintiff, in his petition, by innuendo, placed upon the words spoken. The innuendo charges that defendant intended and meant, by the language used, to charge plaintiff with oppression and partiality in the discharge of his official duties as superintendent of streets; and the claim is that he should be held to the interpretation he himself placed upon them, while the instruction authorized a recovery on proof of the falsity of the words admittedly spoken. The innuendo is intended to define the defamatory meaning which the plaintiff places upon the words used. In case the defamatory meaning is apparent from the language charged, there is no necessity for an innuendo at all. The purpose of the innuendo, and its effect upon the party pleading it, is thus expressed by Townsend in his work on Slander (section 338): "Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies whether the ambiguity be patent or latent, and whether or not there are any facts alleged as inducement. By this means the defendant is informed of the precise charge he has to meet, and to deny or justify. But the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be defeated on the ground of variance or failure of proof; for when the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action." To the same effect, see Starkie, Sland. & L. § 446; Newell, Defam. p. 629, § 39; Odger, Sland. & L. 100. It will be seen that the office of the innuendo is to set a meaning upon words or language which are of doubtful or ambiguous import, and, taken alone, are not actionable; and it follows that, in case the defamatory meaning is apparent from the words used, an innuendo is unnecessary. Its use is only necessary in order to bring out the latent, injurious meaning of the words employed. When used for this legitimate and necessary purpose, the plaintiff will be bound to abide by his own construction of the words used. The innuendo thus becomes a part of the cause of action stated. The rule, as given by all the text writers, is different when the words charged are actionable in themselves. In such case the defendant can put in issue the truth of the words spoken, either with or without the alleged meaning. "It will then be for the jury to say, from the proofs, whether the plaintiff's innuendo was sustained. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves, without the alleged meaning, and that, therefore, his unproved innuendo may be rejected as surplusage." Newell, Defam. p. 628, § 38; Odger, Sland. & L. 101, and cases cited. "An innuendo will not vitiate the proceedings, though new matter be introduced; and where the matter is superfluous, and the cause of action is complete without it, the innuendo may be rejected." Starkie, Sland. & L. 482; Gage v. Shelton, 3 Rich. Law, 242. "If a complaint is sufficient without the innuendo, the innuendo may be rejected as surplusage. The innuendo may always be rejected when it merely introduces matter not necessary to support the action." Towns. Sland. & L. § 344, and cases cited; 13 Am. & Eng. Enc. Law, 468. The principle announced by these authors is supported by numerous cases cited by them,—a case from this court being one. In that case, defendant charged plaintiff with being a whore, meaning thereby that plaintiff "had been guilty of the crime of adultery." The proof disclosed that plaintiff was an unmarried woman. Upon an appeal from a judgment in favor of plaintiff, defendant insisted that as plaintiff, by innuendo, had declared that defendant's wife intended, by speaking the words, to impute adultery, plaintiff was bound to prove they were uttered in the sense thus ascribed to them; but the court held that the innuendo could be rejected, and sustained the judgment. Hudson v. Garner, 22 Mo. 424. There can be no doubt that the words "downright thief," applied to plaintiff, imputed to him the crime of larceny, and were in themselves actionable. The innuendo, charging that defendant meant thereby to charge plaintiff with official corruption, oppression, and partiality also imputed a crime, and was actionable. Rev. St. 1889, §§ 3732, 3733. Defendant, by answer, admitted that he applied to defendant the term "downright thief," as charged. Upon this state of the pleading, we do not think there was error in instructing the jury that plaintiff could recover if defendant spoke the words as charged, and they were false, unless plaintiff was justified in so speaking.

3. The first instruction required the jury, in order to find for plaintiff, to also find that the defamatory words were spoken with malice. The second instruction told the jury that malice existed in law "whenever a wrongful act is intentionally done without just cause or excuse." The fifth instruction authorized the jury, in making their verdict, to add thereto, as punitive damages, "such amount as will adequately punish the defendant for such act, and serve as a warning to prevent others from being guilty of a like act." Exemplary damages were thus authorized without proof of express malice. Defendant insists that punitive damages, in suits for slander, are only recoverable when the wrong-

doer was actuated by actual or express malice, as distinguished from malice implied by law. No one is excused for the libel or slander of another for the reason that the wrongdoer was without malice. The actual injury suffered does not depend upon the motive of the wrongdoer. The object, then, in giving evidence in proof of malice, is to increase the damages beyond what was actually sustained. Odger, Sland. & L. 269; Towns. Sland. & L. § 91; Suth. Dam. § 1225, and cases cited. In slander the words are always intentionally spoken, whatever meaning may be imputed to them. Hence, it is said, when slanderous words are spoken, or a libelous article is published falsely, the law will affix malice to them. There is no necessity of proving express malice. Buckley v. Knapp, 48 Mo. 161. So it is uniformly held that when the words spoken are actionable in themselves, and are proven to be false, the law will imply malice. Hall v. Adkins, 59 Mo. 144; Price v. Whitely, 50 Mo. 439; Noeninger v. Vogt, 88 Mo. 589; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724. So it will appear that malice, such as the law implies, is the very gist of the action for slander. It is held in some of the cases last cited that, when the words spoken are actionable in themselves, the person injured will be entitled to recover without alleging or proving special damages. It is also held that a repetition of the defamatory words may be given in evidence for the purpose of proving express malice (Noeninger v. Vogt, 88 Mo. 593), and thereby increasing the damage, though malice was implied from the words spoken. It is said that "malice, in legal understanding, implies no more than willfulness." Buckley v. Knapp, supra. Again, malice in law is defined as "the malice which is inferred from doing a wrongful act without lawful justification or excuse." 1 Starkie, Sland. & L. 213. Townsend says: "The distinction between malice in law and malice in fact has been supposed to consist in this: that the one is inferred, and the other is proved. The supposed distinction is unreal and unsound; for, first, there is no distinction between what is inferred and what is proved,—what is, or is supposed to be, rightly inferred is proved." Towns. Sland. & L. p. 68, § 87. We may say, then, that malice, whether expressed or implied, means the same, the only difference being in the establishment of it. When malice is implied from the words spoken or published, the burden is on the defendant to prove lawful justification or excuse, or the absence of a malicious intent. On the other hand, if the words themselves do not imply malice, the burden rests upon the plaintiff to establish it. When malice exists, punitive damages may be given; and it cannot be seen why a distinction should be made when the evil intent existed, whether implied or proved. It is true a distinction is made by some courts, and it is held that, unless express malice is proved, exemplary damages should not be allowed. This line of decision was followed by the St. Louis court of appeals in Nelson v. Wallace, 48 Mo. App. 193, and Fulkerson v. Murdock, 53 Mo. App. 156. It is argued that punitive damages are only allowed in trespass and other actions for torts, when the offense is committed in a wanton, rude, and aggravated manner, indicating oppression, or a desire to injure, and that no reason can be seen for the application of a different rule in cases for slander or libel. We think the distinction does not in fact exist. Malice is implied in the willful doing of any wrongful act, without justification or excuse, whereby injury is done to another, whether it be to his character, his person, or his property. Where such act is done maliciously, therefore, the injured person should be entitled to exemplary damages; and it would be immaterial whether malice was implied from the nature of the act itself, or inferred as a fact from all the circumstances under which it was committed. The question is whether the wrong was done willfully, and without lawful justification or excuse. Whatever the decisions of the other states may be, there seems no just ground for distinguishing between malice in fact and malice in law, in respect to the right to exemplary damages, in action for libel and slander; and the decisions of this state make no such distinction. In Buckley v. Knapp, supra, an instruction was approved which authorized the recovery of punitive damages upon implied malice alone; and that decision was followed in the subsequent case of Clements v. Maloney, 55 Mo. 359, and the doctrine has since these decisions been regarded as settled. It is said in Bergmann v. Jones, 94 N. Y. 62: "The falsity of the libel is sufficient proof of malice to uphold exemplary damages, and plaintiff's right to recover them is in the discretion of the jury. When the falseness of the libel is proved, as a general rule, it is sufficient to warrant the jury in giving exemplary damages." This ruling was approved by the same court in Warner v. Publishing Co., 132 N. Y. 183, 30 N. E. 393, and expressly followed in Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935. To the same effect is the case of Blocker v. Schoff, 83 Iowa, 269, 48 N. W. 1079.

4. Exemplary damages may always be given, in suits for slander, when the words are maliciously spoken; but whether such damages should be given, in any case, is a matter within the discretion of the jury. In order to show good faith, and want of malice, the defendant has the right to put in evidence all the circumstances under which the words were uttered; and, if such circumstances tend to rebut malice, such damages could only be awarded in case the words were maliciously spoken, but may, in themselves, be sufficient proof, if malice is implied therefrom. Plaintiff, by innuendo, charged that defendant, by the slanderous

words used, intended to impute to him corruption in office. Defendant, by answer, and in mitigation of damages, admitted that the words spoken had respect solely to plaintiff's official conduct. Defendant offered, as was his right to do, evidence tending to prove the circumstances under which the objectionable words were used, in order to prove good faith, and want of malicious intent. As has been said, defendant, as an interested citizen, had the right to make reasonable comment and fair criticism upon plaintiff's official conduct, but he had no right to go beyond that, and slander him. It was, in view of all the circumstances, for the jury to say how far the evidence mitigated the malice, if at all, and to award the damages accordingly. We think the effect of the instruction on the measure of damages was to ignore this defense, and, as the question of exemplary damages was a matter independent of the right to recover, the error was not cured by the first instruction, which required a finding that the words were maliciously spoken in order to a recovery for any amount. Exemplary damages are given by way of punishment, and the jury should be so instructed thereon as to leave no doubt on the subject.

5. There was no error in refusing to permit defendant to testify as to the motives which actuated him in speaking the defamatory words, so far as the testimony affected the right to recover compensatory damages. The effect would be the same though he meant to say one thing, and said another. He is answerable for so inadequately expressing his meaning. Newell, Defam. p. 301; McGinnis v. George Knapp & Co., 109 Mo. 148, 18 S. W. 1134. But the motives or purposes with which the words were spoken lie at the very foundation of malice. They are the very conditions upon which exemplary or punitive damages are predicated, and no good reason appears why defendant should not be permitted to prove what his motives were. Odger says: "In all cases, the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly, no vindictive damages could be given. In every case, therefore, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith, and with honesty of purpose, and not maliciously." Odger, Sland. & L. 317. "Upon principle, the spirit and intention of the party publishing a libel are fit to be considered by the jury, in estimating the injury done to the plaintiff, and evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action." Starkie, Sland. & L. § 639. "The intent—meaning the intent to effect certain consequences—with which an act is done is material on the question of the amount of damages. The absence of a bad intent will mitigate the damages. The presence of a bad intent will aggravate them." Townsh. Sland. & L. § 91. We think evidence of the intention and motive of defendant was admissible for the purpose of mitigating the punishment, by way of exemplary damages; but the jury should have been cautioned not to allow such evidence to operate as a defense to the action, or to mitigate the actual damages sustained.

6. It does not appear upon the face of the acceptance offered in evidence that it authorized any particular person to collect the amount due for putting in the curbing, yet delivery to, and possession by, one who had only done a small portion of the work, was a circumstance which may have given the holder an advantage; and we think the certificate should have been admitted for what it was worth. The transaction in which the certificate was issued by plaintiff was commented upon by defendant in the discussion in which the slanderous words were used, and defendant had the right to place the whole matter before the jury, for the purpose of showing good faith, and want of actual malice. For the same reason, defendant should have been permitted to show what he had been told by others in reference to this acceptance. Blocker v. Schoff, 83 Iowa, 265, 48 N. W. 1079; Orth v. Featherly, 87 Mich. 320, 49 N. W. 640.

7. There was no error in refusing to permit witness Lane to testify as to his understanding of the slanderous words used by defendant. A witness may testify to the speaking of the slanderous words, "together with all the attendant circumstances and connections, the existing facts; and, after having done so, it is for the jury to determine from the evidence what was meant." Newell, Defam. p. 308, and cases cited in note. For the errors noted the judgment is reversed, and the cause remanded.

BARCLAY, J., absent. The other judges concur.

LOUISVILLE, N. A. & C. RY. CO. v. SNYDER.

(20 N. E. 284, 117 Ind. 435.)

Supreme Court of Indiana. February 21, 1889.

Appeal from circuit court, Clinton county; Joseph C. Suit, Special Judge.

Action by James B. Snyder against the Louisville, New Albany & Chicago Railway Company, for personal injuries. Judgment for plaintiff, and defendant appeals.

S. O. Bayless and W. H. Russell, for appellant. T. H. Palmer, W. F. Palmer, B. K. Higinbotham, and M. Bristow, for appellee.

ELLIOTT, C. J. The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White river, and the appellee severely injured.

Dr. Bowles, an expert witness called by the appellant, gave an opinion as to the nature and extent of the injury sustained by the appellee, and on cross-examination it was developed that his testimony was in part based on statements made to him by the appellee. Waiving all questions of practice, and deciding the appellant's motion to strike out as if it were properly restricted to the alleged incompetent part of the testimony, we have no hesitation in deciding that the trial court did right in overruling the motion. As we have often decided, the physical organs of a human being cannot be inspected by the eyes of a surgeon, and the statements of the sufferer must, of necessity, be taken by the surgeon. It is not possible for any surgeon, by a mere external examination, to always discover the character of an injury, and properly describe or treat an injured man; and for this reason, if for no other, the statements of the injured person descriptive of present pains or symptons are always competent, although narratives of past occurrences are inadmissible. On this point our own decisions are harmonious, and they are right upon principle, and are well supported by authority. Railroad Co. v. Newell, 104 Ind. 264, 3 N. E. 836; Railway Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, and 4 N. E. 908; Railway Co. v. Wood, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197; Board v. Leggett, 115 Ind. 544, 18 N. E. 53; Hatch v. Fuller, 131 Mass. 574; Railroad Co. v. Johns, 36 Kan. 769, 14 Pac. 237; Quaife v. Railroad Co., 48 Wis. 513, 4 N. W. 658. From these decisions we shall not depart.

The fact that the appellee was suffering from Bright's disease at the time he was injured does not impair his right of recovery. The rule is this: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages." Railroad Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; Railway Co. v. Wood, supra; Railroad Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; Railroad Co. v. Buck, 96 Ind. 346; Ehrgott v. Mayor, 96 N. Y. 264; Jucker v. Railroad Co., 52 Wis. 150, 8 N. W. 862; Railway Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Railway Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 545; Railway Co. v. Leslie, 57 Tex. 83.

The rule we have stated is thus expressed in one of our best text-books: "Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, the defendant's negligence will still be held to be the proximate cause." 2 Shear. & R. Neg. (4th Ed.) § 742.

The instructions clearly and properly state the law on this subject.

The court did not err in instructing the jury as to the degree of care required of the appellant; at least, not as against the appellant. The rule is well settled that carriers are bound to use the highest practicable degree of care to secure the safety of passengers.

There was no evidence of contributory negligence on the part of the appellee, and the court might well have refused any instruction at all upon that point. Where a passenger is in his proper place in the car, and makes no exposure of his person to danger, there can be no question of contributory negligence. Decisions like that of Railway Co. v. Greene, 106 Ind. 279, 6 N. E. 603, in cases of persons injured at a railroad crossing, are not applicable to such a case as the one at our bar. The law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable. Railroad Co. v. Rainbolt, 99 Ind. 551.

The law will not tolerate any negligence on the part of carriers, although they are not insurers of the safety of their passengers. The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier. Packet Co. v. McCool, 83 Ind. 392; Railroad Co. v. Buck, 96 Ind. 346; Railroad Co. v. Newell, supra; Railroad Co. v. Rainbolt, supra; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125.

In Railroad Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627, the rule was applied in a case growing out of the same occurrence as that in which the appellee was injured. The twenty-second instruction asked by the appellant, and refused, reads thus: "The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances." This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers, and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skillfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use; for the company is bound to test them, from time to time, to ascertain whether they are being impaired by use or exposure to the elements. Manser v. Railway Co., 3 Law T. (N. S.) 585; Railroad Co. v. Suggs, 62 Tex. 323; Stokes v. Railway Co., 2 Fost. & F. 691; Robinson v. Railroad Co., 9 Fed. 877; Richardson v. Railroad Co., L. R. 10 C. P. 486, L. R. 1 C. P. Div. 342; Ingalls v. Bills, 9 Metc. 1; Frink v. Potter, 17 Ill. 406; Bremner v. Williams, 1 Car. & P. 414; Hegeman v. Railroad Corp., 13 N. Y. 9; Alden v. Railway Co., 26 N. Y. 102.

The decision in the case of Railroad Co. v. Boyd, 65 Ind. 527, is not in conflict with this doctrine, for in that case an inspection was made.

Judgment affirmed.

BUNTING v. HOGSETT

(21 Atl. 33, 139 Pa. St. 363.)

Supreme Court of Pennsylvania. Jan. 12, 1891.

Appeal from court of common pleas, Allegheny county.

Action by Henry C. Bunting against Robert Hogsett for personal injuries. Plaintiff, Henry C. Bunting, excepted to the following portion of the charge to the jury: "He [plaintiff] is also entitled to compensation for the loss of earning power during the expectancy of his life. That is one of the most difficult things to determine, but you have to use simply your good judgment, for the reason that you cannot tell how long a man may live. You cannot tell whether he will live the full expectancy of his life. No one can tell that. While he was injured by the accident he still might have had a disease that would shorten his life anyhow, and if there is proof of that, as there is proof in this case that he had Bright's disease, and that was not occasioned, or hardly could be occasioned, by this accident, you will take that into consideration, and consider whether, by reason of that, his expectancy of life is not shortened very much from what the tables that have been given in evidence show. It is alleged that his expectancy of life could not be as shown in the tables, because physicians certify he has Bright's disease. Your experience in life will tell you that that is a very dangerous disease, and if it was not caused by this accident—and it is not pretended it was—you will take that into consideration in determining the loss of his earning power during the time which he may be expected to live." The jury returned a verdict of $1,733 in favor of Henry C. Bunting, and of $500 for Phoebe J. Bunting. Plaintiff, Henry Bunting, now prosecutes this appeal, assigning the above charge as error.

Edw. Campbell and Thos. Patterson, for appellant. A. D. Boyd and Lazear & Orr, for appellee.

CLARK, J. There was evidence in this case that the plaintiff, Henry C. Bunting, at the time of the trial, was suffering from what is known as "Bright's disease of the kidneys." Upon a chemical analysis, albumen was found in his urine. He suffered from dizziness, failure of sight, and double vision. He was feeble, had shortness of breath, and a staggering gait, and exhibited other symptoms of this malady. The testimony of some of the medical experts was that they believed him to be suffering from Bright's disease, and there was little, if any, evidence to the contrary. The court very properly, therefore, instructed the jury that there was proof of this fact in the case; that it was a dangerous disease; and that they should take this into consideration in determining Mr. Bunting's expectancy of life and the loss of his earning power. Nor was there any evidence to justify the jury in finding that this disease was caused by the personal injuries received in the collision. The judgment is therefore affirmed.

CARPENTER et al. v. AMERICAN BLDG. & LOAN ASS'N.

(56 N. W. 95, 54 Minn. 403.)

Supreme Court of Minnesota. Aug. 17, 1893.

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Charles W. Carpenter and others against the American Building & Loan Association. Plaintiffs had judgment, and defendant appeals. Affirmed.

Hart & Brewer, Rea & Hubachek, and C. M. Cooley, for appellant. Dodd & Bowman and Norman Fetter, (Lusk, Bunn & Hadley, of counsel,) for respondents.

COLLINS, J. In substance, the complaint herein is identical with that involved in Allen v. This Defendant, 49 Minn. 544, 52 N. W. Rep. 144. The conspicuous difference in the answers in the two actions is that in the case just mentioned the defendant association justified the transactions of which the plaintiff complained, affirmed the regularity and validity of the alleged sales, and relied upon them as a perfect defense to the cause of action, while here the answer disaffirmed and repudiated the sales, expressly averred their invalidity, and alleged that in the month of May, 1892, the various stockholders had been notified by mail that such pretended sales were null, and had no effect upon their rights, and that they were entitled to reinstatement, upon payment of actual dues and fines; and the stockholders were further notified that, unless their stock was reinstated upon the terms proposed, a sale of the same would be made on June 23, 1892, pursuant to the by-laws of the association. The court below found that nearly all of the pretended sales had been made in the years 1889 and 1890. It further found that the notice just referred to was issued in the month of May, 1892, by means of a circular letter, in which it was stated that said sales had been declared void by the courts of the state. It is a fair inference that until this circular was promulgated the defendant had persisted in its assertion that the sales were regular and valid; and as the opinion in the Allen Case was filed on May 16, 1892, it may also be inferred that the circular was prepared after that date, and was induced by the result of that action. The trial court also found that the present case was commenced June 22d, and that the assignments under which the plaintiffs claim were executed and delivered prior thereto. It was found that on June 23d the stock shares had been sold to defendant, in pursuance of the circular notice, and that, in form, the sale was regular.

We regard this cause as wholly controlled by that of Allen v. Association, supra. It was said in the opinion therein—and our views remain the same—that the right of action there recognized and upheld was founded upon the fact that there had been a distinct act of dominion wrongfully exercised over the shareholders' property, inconsistent with their rights, and in denial of them. The defendant corporation, by assuming to sell, and wrongfully selling, the shares, deprived the owners of their stock, and the advantages accruing from it, as much when bidding it in for itself as when it accepted the bid of a stranger, and then transferred the title on its books. This, it was said, was an act of interference, subversive of the rights of the stockholders to enjoy and control the stock, and may be treated by them as a conversion of their property. That any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it, amounts to, and may be treated as, a conversion, was recognized long ago in this court, in Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. Rep. 781. The right, then, of the original shareholders, or of these plaintiffs, as their assignees, to maintain this action, was perfect from the day it accrued up to the time that defendant association abandoned its former line of defense, and offered to reinstate,—a period of from two to three years. This was settled in the Allen Case; so that the present inquiry is solely as to the effect of the offer to reinstate upon an existing and perfect right of action then held by the shareholders or by the plaintiffs, and the offer was nothing more than an offer to return to the rightful owner property already converted to the defendant's use. It was an attempt on the part of the association, after it had actually converted the stock shares to its own use, and had for the term of from one to three years denied that the former owners had any interest in the same, to compel them to receive back the converted property, against their will. The palpable purpose of the offer to reinstate was to deprive the shareholders of a clear right possessed by each to elect as between remedies,—to determine whether their actions should be brought to recover the stock shares in specie, or to recover for the value of the same. If the offer could be given the full effect desired, the defendant would be allowed to perpetrate a wrong; to persist that it had authority so to do; and finally, when defeated in the courts, to take away from the injured party his right to pursue his choice of concurrent remedies. It is safe to say that the option as to remedy is not with the party who has inflicted the injury, for if it were he would be permitted to take advantage of his own wrong.

It is well settled, as a general proposition, that when an actual conversion of chattels has taken place the owner is under no obligation to receive them back, when tendered by the wrongdoer. 6 Bac. Abr. 677; 9 Bac. Abr. 559; 4 Amer. & Eng. Enc. Law, 125, and cases cited. The right of action is complete and perfect when the conversion takes place, and the object of the action is to recover damages, not to regain possession of the thing itself. Even if the goods be returned by the wrongdoer, and are accepted by the owner, after the action is brought, damages, nominal or actual, may be recovered. There is a class of cases when, in trespass or trover, the defendant may mitigate the damages by a timely and proper return of the property. The rules which govern in such cases seem to be that where the wrong lacks the element of willfulness—has been committed in good faith—the court, in its discretion, may order a return, upon timely application by the defendant, accompanied by an offer to pay all costs, and a showing that no real injury will have been suffered by the plaintiff when possession is restored. The right of action is not defeated by the order of the court, but damages are mitigated. The subject and the authorities are fully reviewed in Hart v. Skinner, 16 Vt. 138. See, also, Reynolds v. Shuler, 5 Cow. 323, and Churchill v. Welsh, 47 Wis. 39, 1 N. W. Rep. 398. We have no such case now before us.

The point is made upon this appeal that it was incumbent upon the plaintiffs to produce and surrender up the stock or share certificates before they could recover; Joslyn v. Distilling Co., 44 Minn. 183, 46 N. W. Rep. 337, being the principal authority relied on. But plaintiffs are not asking, as was demanded there, for the cancellation of stock certificates, the transfer of such stock upon the books of the association, and the issuance of new certificates. Nor were the conclusions reached in the Joslyn Case adopted on any view of the negotiability of stock certificates, but on general principles appertaining to the doctrine of estoppel. The transfer or assignment of the certificates here involved could give the purchaser no greater rights, as against the association, than the assignees had. Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. Rep. 727.

The remaining points made by counsel for appellant need not be specifically referred to. Judgment affirmed.

WRIGHT v. BANK OF THE METROPOLIS.

(18 N. E. 79, 110 N. Y. 237.)

Court of Appeals of New York. October 2, 1888.

Appeal from supreme court, general term, Fourth department.

About the 7th of January, 1878, one Henry C. Elliott received from his correspondent in Rome, N. Y., (B. Huntington Wright,) his check for $2,000, payable to the order of Elliott, with a request from Wright that he (Elliott) would meet some drafts Wright would draw on him, and obtain payment from the check. He accordingly honored the drafts, and, having indorsed the check, procured its discount by the defendant. It was not paid when presented, and Elliott being unable to learn the reason, went to Rome to see the drawer of the check. He then learned that the drawer had made a general assignment for the benefit of his creditors, and stated his inability to do anything for Elliott. Finally, Elliott succeeded in obtaining a number of shares of stock in different railroad companies, as collateral security to the check then lying protested in the hands of the defendant. The history of the interview resulting in the procuring of the stock by Elliott as given on the trial is contradictory, but the verdict of the jury shows that they believed that which was given on the part of the plaintiff. From the evidence thus given it appears that the stock was in reality the stock of Benjamin H. Wright, the father of B. Huntington Wright, and that it was delivered by him to Elliott voluntarily, and for the purpose of being used as a collateral to his own note at six months, which was to be used to take up the check; but the stock was not to be sold for six months, as it was then selling in market much below what the father thought the stock was really worth. The stock was owned by Mr. Wright, as he said, for an investment, and he had no idea of selling it; but he allowed Elliott to take it because he felt sorry for his situation, and wanted to help him, as far as he reasonably could, out of the difficulty he was in. Elliott took the stock and went to New York, and had a talk with the cashier and vice-president of the defendant, who reserved their decision as to whether they would take the note and the stock. Subsequently, and on the 17th of January, the cashier wrote that the stock being non-dividend paying, and the note six months paper, it would be impossible to get it through the board; and he suggested it would be much better to obtain Mr. Wright's consent to sell the stock, and to make his (Elliott's) account good in that way. Elliott inclosed this note to Mr. Wright in a letter addressed to "B. H. Wright;" and in response, and on the 22d day of January, Benjamin H. Wright, the owner of the stock, wrote Mr. Rogers, the cashier of defendant, refusing to sell the stock, or to permit of its being sold. Mr. Rogers had never seen either of the Messrs. Wright, and did not know there were two; and subsequently, and about the 29th of January, Elliott told him that Mr. Wright authorized the sale of the stocks, and they were immediately sold, less commission for $2,261.50. On the part of the plaintiff it was claimed that Mr. Wright, the true owner of the stocks, never gave any such authority to sell them, and that he was unaware that they had been sold until May 9, 1878. February 14, 1881, the stock reached the highest price, down to the day of trial, selling on that day for $18,003. This action was commenced October 7, 1879. Mr. Wright, the owner of the stock, was about seventy-six years of age in May, 1878, and in the latter part of that year went south, and returned early in the year 1879. On the 9th of May, 1878, he made a demand upon the defendant for the stocks, and tendered to it the amount of the check and interest, being something over $2,000. The cashier stated the stocks had been sold by the authority of the owner thereof, as he supposed, given through Mr. Elliott, and refused to deliver them or their value. The original plaintiff died since the first trial of the case, and the present one was duly substituted. The court charged the jury that if they found for the plaintiff he was entitled to recover the highest price at which the stocks could have been sold in the market between the date of their actual conversion and a reasonable time thereafter, and that the jury should fix the reasonable time, not arbitrarily or through sympathy or prejudice; but they were to say what, under all the circumstances, would be a reasonable time within which to commence this action, and also, it may be, reasonable diligence in prosecuting it; because if the action were commenced in fact within a reasonable time after the conversion of the stock, and had been prosecuted with reasonable diligence since, then the plaintiff was entitled to recover the highest market price that the stock reached between the date of the conversion and the time of the trial, less the amount of the check and interest, and with interest on the balance. This charge was duly excepted to. The jury found a verdict for $3,391.25. There is no evidence which shows when the stock reached that value. Upon the rendition of the verdict both parties moved to set it aside, the plaintiff on the ground that he was entitled, under the charge, to the highest value of the stock down to the trial, and the defendant on the ground that the damages were excessive and contrary to evidence. The court granted the motion of the plaintiff, and set the verdict aside on the ground stated, and denied the motion of the defendant. The defendant appealed to the general term from both of such orders. That court reversed the order setting aside the verdict, and ordered judgment thereon, and affirmed the order made on defendant's motion, refusing to set aside the verdict. Judgment was then entered upon the verdict of the jury, and from that judgment both sides appeal to this court, and they also appeal from the orders of the general term upon which the judgment was entered.

W. E. Scripture, for plaintiff. Joseph H. Choate and John Delahunty, for defendant.

PECKHAM, J., (after stating the facts as above.) This case comes before us in a somewhat peculiar condition. As both parties appeal from the same judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge the case was left to the jury to give the highest price the stock could have been sold for, intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under Romaine v. Van Allen, 26 N. Y. 309, and several other cases of a somewhat similar nature, referred to therein. Markham v. Jaudon, 41 N. Y. 235, followed the rule laid down in Romaine v. Van Allen. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the Markham Case the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of Romaine. In this state of the rule the case of Matthews v. Coe, 49 N. Y. 57-62, came before the court. The precise question was not therein involved; but the court, per Church, C. J., took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances; and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in Baker v. Drake, 53 N. Y. 211, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in Markham v. Jaudon, supra, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment. In the course of his opinion the judge said that the rule of damages, as laid down by the trial court, following the case of Markham v. Jaudon, had "been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states." The rule was not regarded as one of those settled principles in the law as to the measure of damages, to which the maxim stare decisis should be applied. The principle upon which the case was decided rested upon the fundamental theory that in all cases of the conversion of property (except where punitive damages are allowed) the rule to be adopted should be one which affords the plaintiff a just indemnity for the loss he has sustained by the sale of the stock; and, in cases where a loss of profits is claimed, it should be, when awarded at all, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted. The rule thus stated, in the language of Judge Rapallo, he proceeds to apply to the facts of the case before him. In stating what in his view would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment; and he added that, if they had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done. The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendant was illegal and a conversion, and that plaintiff had a right to disaffirm the sale, and to require defendants to replace the stock. If they failed, then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so.

Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it and sells the stock. The duty of the broker is to replace it at once, upon the demand of the plaintiff. In case he does not, it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock, and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock, just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and, in case he fail so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty it seems to me is founded upon the general duty which one owes to another who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do. It is well said by Earl, J., in Parsons v. Sutton, 66 N. Y. 92, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care, or inexcusable negligence permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." See, also, Dillon v. Anderson, 43 N. Y. 231; Hogle v. Railroad Co., 28 Hun, 363,—the latter case being an action of tort. In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same. Per Denio, C. J., in Scott v. Rogers, 31 N. Y. 676; and per Rapallo, J., in Baker v. Drake, supra. The rule of damages as laid down in Baker v. Drake, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court. See Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock, and was the absolute owner thereof. In Baker v. Drake the learned judge did not assume to declare in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the Romaine Case. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the Romaine Case, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, the damages claimed, it was necessary to overrule the Markham Case, which was done. Now, so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock, which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases; and that measure is the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation; for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith, and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damage as light as he reasonably may rests upon him in both cases; for there is no more legal wrong done by the defendant in selling the stock which the plaintiff has fully paid for than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time, or prosecuted with reasonable diligence; and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial; and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume in favor of an investor that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases, that there was good faith on the part of the appellant. It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law. See Colt v. Owens, 90 N. Y. 368; Hedges v. Railroad Co., 49 N. Y. 223.

We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was $2,795, and, as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold, as then it is presumed the defendant paid the check with the proceeds of the sale. In all this discussion as to the rule of damages we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence, but we cannot see any question in the case showing bad faith, or indeed any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott. The opinion delivered by the learned judge at general term, while agreeing with the principle of this opinion as to the rule of damages in this case, sustained the verdict of the jury upon the theory that, if the plaintiff had gone into the market within a reasonable time, and purchased an equivalent of the stocks converted, he would have paid the price which he recovered by the verdict. This left the jury the right to fix what was a reasonable time, and then assume there was evidence to support the verdict. In truth there was no evidence which showed the value of the stock to have been anything like the amount of the verdict, for the evidence showed it was generally very much less, and sometimes very much more. But fixing what is a reasonable time ourselves, it is seen that the stock within that time was never of any such value. The judgment should be reversed, and a new trial granted, with costs to abide the event.

EARL, FINCH, and GRAY, JJ., concur. RUGER, C. J., and ANDREWS and DANFORTH, JJ., dissent.

BALTIMORE & O. R. CO. v. CARR.

(17 Atl. 1052, 71 Md. 135.)

Court of Appeals of Maryland. June 11, 1889.

Appeal from circuit court, Prince George's county.

Argued before ALVEY, C. J., and MILLER, ROBINSON, IRVING, BRYAN, and McSHERRY, JJ.

John K. Cowen, F. Snowden Hill, Thos. Anderson, and *W. Viers Bouic, Jr.*, for appellant. *George Peter, Jas. B. Henderson*, and *William Stanley*, for appellee.

ALVEY, C. J. This is an action on the case, brought by the appellee against the appellant for the wrongful refusal of admission of the former to the cars of the latter, and the action was tried upon the general issue and plea of not guilty of the wrong alleged. The declaration contains but a single count, in which it is alleged that the plaintiff purchased a ticket for a passage on the road of the defendant from the town of Rockville to the city of Washington, and return; that the plaintiff became a passenger on the defendant's road, and was transported from Rockville to the city of Washington, and that on his return within the time limited by his ticket he presented himself at the gate in the depot of the defendant in Washington city, in proper time to take a return train to the town of Rockville, scheduled to leave the depot at 5:31 P. M., and that he was refused by the gate-keeper admission to such train. And it is then alleged that the plaintiff was entitled by virtue of his ticket to pass through the gate, for the purpose of getting on the train, to be conveyed from Washington city to Rockville, and that it "was the duty of the defendant to provide competent and polite servants and agents to attend and to have charge of the gate through which passengers were compelled to pass to get on the said train of cars; yet the defendant, unmindful of its duty in this regard, refused to permit the plaintiff to pass through the said gate to enter the cars so as to be conveyed from Washington city to the town of Rockville, and neglected to provide competent and polite servants and agents to have charge of the gate by which passengers obtained access to the cars, but had a rude, impolite, and incompetent servant in charge of said gate, who then and there refused to permit the plaintiff to pass through said gate to the said train of cars, and with force pushed back the plaintiff, and was guilty of other rude, impolite, and improper treatment of the plaintiff, by reason whereof the plaintiff was prevented from attending to his business engagements in the town of Rockville, and the feelings of the plaintiff were greatly injured and outraged, and he was subjected to great vexation, indignity, and disgrace, and compelled and forced to remain in the city of Washington until a late hour in the night, to-wit, the hour of ten minutes past ten o'clock; and the plantiff therefore brings suit," etc. The proof shows that the plaintiff, with a ticket entitling him to a return passage to Rockville, presented himself at the gate in the depot at Washington city giving admission to passengers to departing trains, and sought admission to the train that left the depot, according to published time-table, at 5:31 P. M. for Rockville and other points on the Metropolitan road. The plaintiff himself testifies that he reached the gate some two or three minutes before the time for the train to start; but whether the plaintiff presented himself at the gate immediately before or immediately after the signal by gong for excluding passengers at the gate for the particular train, would seem to be left in doubt, the evidence upon this point being in conflict. The plaintiff testifies that he did not hear the gong,—the signal for the train to start; but he swears that the train had not left the depot, and that he had time within which he could have reached and entered the train, if he had been allowed to pass the gate as he desired to do. The proof on the part of the defendant is that the gong had sounded, but the train was delayed some two or three minutes in attaching and taking out some extra cars; and that it is the duty of the gate-keeper to act on the signal given by the sound of the gong, and that he knew nothing of the delay that would be caused by the taking out the extra cars. The plaintiff swears that he was not only prevented from having access to the train, but that he was rudely resisted, and was struck by the gate-keeper, though he says he was not physically injured.

Upon the whole evidence the defendant offered three prayers for instruction to the jury, all three of which were rejected by the court; and the court substituted its own instructions, intended to cover the whole case, in the following terms: "If the jury find that the plaintiff had purchased a ticket from Washington to Rockville, and intended to leave on the 5:31 P. M. train, but that by the instructions given by defendant to its gate-keeper passengers were not allowed to pass through the gate after the last gong had sounded for the departure of the train, in order to take such train, and that the last gong had sounded for the departure of the 5:31 P. M. train before the plaintiff endeavored to pass through the gate, then the plaintiff is not entitled to recover, unless the jury find that the gate-keeper used unnecessary force to prevent the plaintiff from passing through the gate; and, if the jury find that such unnecessary force was used, then the plaintiff is entitled to such damage as may compensate him for the injury to his person and feelings that resulted from such unnecessary force. (2) But if the jury find that the plaintiff had arrived at the gate before the last gong had sounded, and had his ticket, which was duly exhibited to the gate-keeper, but was refused entrance to the train, then the plaintiff is entitled to such damages as the jury may find would, under all the circumstances, compensate him for such refusal." It was under these instructions that the verdict was found for the plaintiff. Exception was taken to the instructions given, and also to the refusal to grant the prayers offered by the defendant. The first of the defendant's prayers would seem to be based upon the theory that this is, in substance at least, an action upon the contract of carriage of the plaintiff over the road of the defendant. But this is in form an action of tort. The contract, it is true, entitled the plaintiff to admission to the cars, and gave rise to the duty on the part of the defendant to allow such admission under proper circumstances; but in cases of the class to which this belongs the refusal or neglect to perform that duty, as well as the negligent performance of it, furnishes a ground of action in tort. In such case both the non-feasance and the misfeasance constitute a wrongful act, for which the remedy may be either by action on the contract or in tort, at the option of the party injured. Boorman v. Brown, 3 Q. B. 526; and same case affirmed in the house of lords, (11 Clark & F. 1.) The prayer, as an abstract proposition, may be correct enough, but it would likely have a tendency to mislead in a case like the present, and therefore there was no error in rejecting it. Nor do we think there was error in rejecting the second prayer of the defendant. This prayer has reference to the power of the defendant to make, and to require to be conformed to, reasonable rules and regulations for the admission of passengers to its trains while in the depot. That the enforcement of reasonable rules and regulations for the admission to trains in a crowded depot, where trains are constantly departing for different points and directions, is an actual necessity, does not admit of question or doubt. Such regulations are not only necessary to prevent confusion and for the preservation of order, but are necessary for the guidance and protection of the traveling public. And, such being the case, the railroad company must have power to make and require to be observed such reasonable rules and regulations. But such rules and regulations must always be enforced with due regard to the rights of the passenger. In the first place, the rules and regulations must not be of a nature to be unreasonably obstructive of the rights and convenience of the passenger; nor should they be enforced in an arbitrary and unreasonable manner, to the unnecessary hindrance and delay of the passenger, or in a manner to subject him to indignity or unnecessary annoyance. And in this case, though the gate-keeper may have been mistaken as to the departure of the train in fact, or as to his duty under the rules and regulations of the depot, yet, if the circumstances were such, at the time the plaintiff presented himself at the gate, as to entitle him to admission to the train then still being in the depot, and before it had started, such mistake of the gate-keeper could afford no defense to the right of the plaintiff to recover. Railroad Co. v. Blocher, 27 Md. 277. But, in respect to the right of the defendant to enforce rules and regulations for admission to its trains in the depot, the instructions of the court were as favorable as the defendant could possibly ask. The defendant obtained in those instructions substantially everything that was sought by its second and third prayers, and therefore there was no error in refusing those prayers as presented by the defendant.

We think, however, there was error in the second instruction of the court, in respect to the question of damages. The jury were instructed that, if they found for the plaintiff for the refusal to pass him through the gate, then he was entitled to such damages as they might find would, under all the circumstances, compensate him for such refusal. This left the whole question of damages at large, without definition by the court, to the discretion of the jury, and without any criterion to guide them. What compensation would embrace—whether actual and necessary expenses incurred by reason of the refusal, or the mere delay, or disappointment in pleasure, or the possible loss in business transactions, however remote or indirect, or for wounded feelings—were matters thrown open to the jury, and they were allowed to speculate upon them without restraint. This is not justified by any well-established rules of law. In the case of Knight v. Egerton, 7 Exch. 407, where, in effect, such an instruction was given, the court of exchequer held it to be wholly insufficient, "and that it was the duty of the judge to inform the jury what was the true measure of damages on the issue, whether the point was taken or not;" and the court directed a new trial because of the indefinite instruction as to the true measure of damages. The rule by which damages are to be estimated is, as a general principle, a question of law to be decided by the court; that is to say, the court must decide and instruct the jury in respect to what elements, and within what limits, damages may be estimated in the particular action. Harker v. Dement, 9 Gill, 7; Hadley v. Baxendale, 9 Exch. 341, 354. The simple question whether damages have been sustained by the breach of duty or the violation of right, and the extent of damages sustained as the direct consequences of such breach of duty or violation of right, are matters within the province of the jury. But beyond this juries, as a general rule, are not allowed to intrude, as by such intrusion all certainty and fixedness of legal rule would be overthrown and destroyed. In a case like the present the rule for measuring the damages is fixed and determinate, and should be applied to all cases alike, except in those cases where there may be malice or circumstances of aggravation in the wrong complained of, for which the damages may be enhanced. Indeed, it is of the utmost importance that juries should be explicitly instructed as to the rules by which they are to be governed in estimating damages; for, as it was justly observed by the court in Hadley v. Baxendale, supra, "if the jury are left without definite rule to guide them, it will, in most cases, manifestly lead to the greatest injustice." In cases of this character the jury can only give such damages as were the immediate consequences naturally resulting from the act complained of, with the right to allow exemplary damages for any malice, or the use of unnecessary force, in the commission of the wrong alleged. Railroad Co. v. Blocher, supra. The expenses incurred by the plaintiff, occasioned by the refusal of the defendant to admit him to the train, such as the expense of a ticket to travel upon another train, and hotel expenses incurred by reason of the delay, may be allowed for; and mere inconvenience may be ground for damage, if it is such as is capable of being stated in a tangible form, and assessed at a money value; and so for any actual loss sustained in matters of business that can be shown to have been occasioned as the direct and necessary consequence of the wrongful act of the defendant made the ground of action. Denton v. Railway Co., 5 El. & Bl. 860; Hamlin v. Railway Co., 1 Hurl. & N. 408; Hobbs v. Railway Co., L. R. 10 Q. B. 111; Wood's Mayne, Dam. 398, 399; 2 Greenl. Ev. § 254. For the error in the second instruction of the court, with respect to the measure of damages, the judgment of the court below must be reversed, and a new trial awarded.

LIMBURG v. GERMAN FIRE INS. CO. OF PEORIA.[1]

(57 N. W. 626, 90 Iowa, 709.)

Supreme Court of Iowa. Jan. 26, 1894.

Appeal from superior court of Keokuk; H. Bank, Jr., Judge.

Action on a policy of insurance. Jury trial; verdict and judgment for plaintiff. Defendant appeals.

James C. Davis, for appellant. J. F. Smith, for appellee.

KINNE, J. * * * * * *

5. The jury were told by the court in an instruction that if they found that the building was not totally destroyed, and it could be repaired at an expense of $200 to $250, then plaintiff's damages would be limited to the amount it would have cost to repair said building, and put the same in as good condition as before the fire occurred, with 6 per cent. interest per annum thereon. Under the provisions of the policy this instruction was proper, and, whether it was so or not, the jury were bound to follow it. The undisputed evidence was that for $250 the building could have been made as good as it was before the fire. The jury disregarded the court's instruction, and found for plaintiff for the full amount of the policy, with interest. The court should have set the verdict aside for the reasons given. Reversed.

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[1] Portion of opinion omitted.

ROBINSON v. TOWN OF WAUPACA.

(46 N. W. 809. 77 Wis. 544.)

Supreme Court of Wisconsin. Oct. 14, 1890.

Appeal from circuit court, Waupaca county.

This is an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by a defective highway in the defendant town. On June 6, 1886, the plaintiff was riding with her husband on such highway in a vehicle on two wheels, called a "dog-cart," drawn by one horse, then being driven by her husband. When the horse was walking briskly, one wheel of the cart struck a stone a few inches high, firmly fixed in the ground, and extending from the side of the traveled track to within three or four inches of one of the wagon ruts in the track; and, by reason of the concussion, plaintiff was thrown from the cart, and received the injuries complained of. On the trial of the cause, the court allowed witnesses for the defendant to testify, against objection by the plaintiff, that, in their opinion, carts like the one in which plaintiff was riding at the time she was injured are unsafe for the use of two persons riding over ordinary country roads. The trial resulted in a verdict for the plaintiff, assessing her damages at $167. The plaintiff moved for a new trial, mainly on the ground that the damages so assessed are inadequate to compensate her for the injury she proved she sustained. The motion was denied, and judgment was thereupon entered for the plaintiff, pursuant to the verdict, from which judgment she appeals to this court.

Cate, Jones & Sanborn, for appellant. *Reed, Grace & Rock*, for respondent.

LYON, J., (after stating the facts as above.) Counsel for the plaintiff claims a reversal of the judgment on two grounds. These are that the court erred in allowing witnesses for the town to testify that, in their opinion, the cart in which the plaintiff was riding was unsafe for the use of two persons riding together in it on ordinary country roads, and that the damages awarded the plaintiff are grossly inadequate to compensate her for the injuries she received.

1. Undoubtedly it was error to admit testimony of the opinions of witnesses that the cart was thus unsafe. That was a question for the jury, upon all the facts in the case. This court so held in Kelley v. Fond du Lac, 31 Wis. 179; Oleson v. Tolford, 37 Wis. 327; Griffin v. Town of Willow, 43 Wis. 509; and other cases. But the jury found for the plaintiff, and, in order to do so, they must necessarily have found that the cart was a proper vehicle to be used by the plaintiff and her husband at the place where she was injured. Hence the testimony thus erroneously admitted did not prejudice or harm the plaintiff, and the error in admitting it is not sufficient ground for reversing the judgment.

II. Were the damages which the jury awarded the plaintiff so inadequate to compensate her for the injuries she sustained that it was the duty of the circuit court to set aside the verdict for that reason? That the court may, and in a proper case should, set aside a verdict for inadequacy of damages and award a new trial, is not questioned. This court so held in Emmons v. Sheldon, 26 Wis. 648, and Whitney v. City of Milwaukee, 65 Wis. 409, 27 N. W. Rep. 39. But, to justify the interference of the court with the verdict, it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that, in awarding them, the jury must have been influenced by a perverted judgment. The court was able thus to characterize the verdict in Emmons v. Sheldon, for the damages there awarded were but $5, (which charged the plaintiff with the costs of the action,) although it was proved that the plaintiff suffered a most serious bodily injury. There seems to have been no controversy as to the extent of such injury. And so in Whitney v. City of Milwaukee the undisputed evidence proved that the plaintiff was so seriously injured that the damages awarded by the jury therefor were grossly inadequate compensation, and so small that the plaintiff was chargeable with the costs, which exceeded the damages awarded. This court was able to say that the verdict was perverse, and that, quoting from the opinion delivered by Mr. Justice ORTON, "such a verdict is trifling with a case in court and public justice, and unworthy of twelve good and lawful men, and is justly calculated to cast odium on the jury system and jury trials." We adhere to the rule established in those cases. Hence the question is, does the testimony bring this case within the rule? In the consideration of this question, we must assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs. The testimony tends to show that the plaintiff was to some extent an invalid before she was injured, and that the pain and disability she has suffered since the injury should, in part at least, be attributed to previous ill health. Then the circumstances of the injury and her condition presently thereafter tend to show that the injury was not so severe as claimed. There is considerable testimony of the above character, and we think it sufficient materially to mitigate her claim for damages. Under the testimony, therefore, there is a wide margin for the jury in assessing damages. Probably a verdict for a much larger sum could have been held not excessive. Perhaps, if the plaintiff's testimony as to the extent of her injuries stood alone, it ought to be held that the damages are inadequate. But in view of all the testimony, and of the fact that the verdict has successfully passed the scrutiny of the learned circuit judge, we do not feel warranted in saying that it is a perverse verdict. Hence, although we might have been better satisfied had a somewhat greater sum been awarded, we are not at liberty to disturb the verdict. The judgment of the circuit court must be affirmed.

CARTER v. WELLS, FARGO & CO.

(64 Fed. 1005.)

Circuit Court, S. D. California. December 10, 1894.

No. 561.

This was an action by James A. Carter against Wells, Fargo & Co. for damages for personal injuries. The jury gave a verdict for the plaintiff for one dollar. Plaintiff moves for a new trial.

Wellborn & Hutton, for plaintiff. Pillsbury, Blanding & Hayne and Graves, O'Melveny & Shankland, for defendant.

ROSS, District Judge. This action was brought to recover damages in the amount of $10,000 for personal injuries alleged to have been sustained by the plaintiff by the negligence of the defendant. The verdict of the jury in favor of the plaintiff necessarily included a finding that the defendant was negligent, and that there was no contributory negligence on plaintiff's part, as set up in defense of the action. There was much evidence in the case tending to show that there was no negligence on the part of the defendant, and, further, that there was such contributory negligence on plaintiff's part as should prevent a recovery by him; and, had the verdict been in favor of the defendant on either or both of those propositions, there would be no interference with it by the court, for the evidence in respect to those matters was substantially conflicting, and the issues in respect thereto were for the determination of the jury, under appropriate instructions from the court, which were given. But the verdict being, in effect, that plaintiff was injured by the defendant's negligence, without contributory negligence on his own part, he was manifestly entitled at the hands of the jury to substantial damages. The evidence was without conflict that the collision which caused the plaintiff's injury threw him from a scaffold eight or ten feet high (on which he was at the time working, for two dollars per day) to the ground, his head and shoulder striking on a large rock, from which he was picked up in an unconscious condition; and that, after regaining consciousness, he was carried to the county hospital, where he remained about five weeks, two weeks of which time he was confined to his bed. These facts of themselves entitled the plaintiff, under the verdict, to substantial damages, and not to the merely nominal sum of one dollar. The head and neck of the plaintiff were, at the time of the trial, much bent to one side, and his walk was that of a paralytic. The defendant introduced many witnesses who testified that his appearance and movements were about the same prior to the injury complained of as they were at the time of the trial, and that they could see no difference in them. This testimony on the part of the defendant was controverted by many witnesses for the plaintiff. The exhibition, however, that was made of the plaintiff's person in court, and the tests that were there made by Dr. Hughes, amounted, I think, to ocular demonstration of the fact that the plaintiff could not possibly have at that time stood upon the plank and performed the work the evidence without conflict showed that he was doing at the time of the accident.

Accepting, as the court must for the purposes of this motion, the facts to be that the plaintiff, without fault of his own, was injured by the negligence of the defendant, it cannot permit a verdict to stand that awards him damages in name only. While the court should and always will be careful not to usurp the functions of the jury, it is, nevertheless, its duty to protect parties from improper verdicts, rendered through misconception, prejudice, passion, or other wrong influences. Lancaster v. Steamship Co., 26 Fed. 233; Gaither v. Railroad Co., 27 Fed. 545; Muskegon Nat. Bank v. Northwestern Mut. Life Ins. Co., 19 Fed. 405; Kirkpatrick v. Adams, 20 Fed. 292. In Field on Damages (page 886) it is said: "It is less usual for the court to interfere with the finding of the jury for inadequate than for excessive damages, though it has the power to do so. * * * But a verdict may generally be set aside for inadequacy, upon the same grounds that warrant the court in interfering where they are excessive."

To the same effect is Gaither v. Railroad Co., 27 Fed. 545.

And in Sedg. Meas. Dam. (volume 2, p. 656) it is said: "The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule is that a new trial will not be granted for smallness of damages. But it seems that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose. So where, in a case for negligence for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict, damages one farthing; a new trial was granted on payment of costs; and Lord Denman said: 'A new trial on a mere difference of opinion as to amount, may not be grantable; but here are no damages at all.'"

In the present case the amount awarded the plaintiff by the jury was practically no damages at all; yet the jury at the same time found, in effect, that the plaintiff was injured through the negligence of the defendant, without any contributory negligence on his own part. The evidence, without conflict, showed that his injuries by the fall were such as, under those circumstances, entitled him to substantial damages. For these reasons the motion for a new trial is granted.

PETERSON v. WESTERN UNION TEL. CO.

(67 N. W. 646, 65 Minn. 18.)

Supreme Court of Minnesota. June 4, 1896.

Appeal from district court, Brown county; B. F. Webber, Judge.

Action by Samuel D. Peterson against the Western Union Telegraph Company. There was a verdict for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

Ferguson & Kneeland, for appellant. S. L. Pierce, for respondent.

START, C. J. This is an action for libel, in which the plaintiff recovered a verdict for $5,200, and the defendant appealed from an order denying its motion for a new trial. The defendant on January 19, 1893, received at its office in New Ulm, from Albert Blanchard, a message for transmission over its telegraph line to St. Paul, which reads thus: "New Ulm, Minn., 1–19, 1893. To S. D. Peterson, Care Windsor, St. Paul, Minn.: Slippery Sam, your name is pants. [Signed] Many Republicans." The New Ulm operator sent the message over the wires to St. Paul, where it was taken from the wire by the operator, and delivered to the plaintiff in a sealed envelope bearing his address as stated in the message.

The record presents three questions for our consideration: (1) Was the message a libel, or fairly susceptible, on its face, of a libelous meaning? (2) Was the evidence sufficient to justify the jury in finding that the defendant maliciously published the supposed libel? (3) Are the damages awarded so excessive as to justify the conclusion that the verdict was the result of passion and prejudice? We answer each of the questions in the affirmative.

1. The message was, on its face, fairly susceptible of a libelous meaning. The sting is in the word "slippery." This word, when used as descriptive of a person, has a well-understood meaning. It means, when so used, that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false. Cent. Dict. If such is the meaning of the word as used in this message,—and of this the jury were the judges,—it was clearly libelous, because, if a man is dishonest, and apt to play one false, he merits the scorn and contempt of all honorable men. To falsely publish of a man that he is slippery tends to render him odious and contemptible. Such a publication is a libel. Wilkes v. Shields (Minn.) 64 N. W. 921.

2. The question whether or not the defendant maliciously published the libel is one of some doubt, but we are of the opinion that it was a question for the jury, under the evidence. Technically, the defendant published the libel when it communicated it to its operator at St. Paul, but whether such publication was wrongful (that is, actionable) depends on the further question whether or not it was privileged. The defendant was a common carrier, and was bound to transmit all proper messages delivered to it for that purpose, but it was not bound to send indecent or libelous communications. Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible. But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator, in sending the message, was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged. The evidence in this case was such that a finding either way on the question whether the defendant maliciously published this libel would not be disturbed by the court. Whether this question was correctly submitted to the jury on the trial of this case, we need not inquire; for there must be a new trial on another ground, and, if there was such error, it is not likely to occur on the next trial.

3. The damages in this case are so excessive as to conclusively show that the verdict was the result of passion and prejudice. Courts should interfere with an assessment of damages by a jury with great caution, and sustain the verdict unless it appears that it was the result of passion or prejudice. But the verdict in this case admits of no defense. As correctly stated by the trial court in its instructions to the jury, the sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public, except through the plaintiff, a verdict assessing his damages at $5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice. The trial

court seems to have regarded the damages so excessive as to justify a new trial, except for the fact that this is the second verdict in the case, and that one reason for setting aside the former verdict was that the damages were excessive. As a rule, the court will not set aside a second verdict on account of excessive damages, but where, as in this case, the verdict is controlled by no reason, supported by no justice, and is manifestly the result of passion and prejudice, it is the duty of the court to set it aside, no matter how many similar verdicts may have been previously returned in the case. Order reversed, and a new trial granted.

LOUISVILLE SOUTH. R. CO. v. MINOGUE.

(14 S. W. 357, 90 Ky. 369.)

Court of Appeals of Kentucky. Sept. 13, 1890.

Appeal from circuit court, Shelby county.

"To be officially reported."

L. C. Willis, *E. Frazier*, and *Thos. W Bullitt*, for appellant. *Gilbert & Force*, *Matt O'Doherty*, and *R. C. Davis*, for appellee.

HOLT, C. J. A train of the appellant was delayed by the air-brakes failing to work. It was overtaken by a construction train of the company, which was known to those in charge of the passenger-train to be but a few minutes behind it, and a collision occurred, the only damage to the passenger-train being the destruction of the rear platform of its rear car. The appellee, Mary J. Minogue, who was a passenger upon it, was by the jar of the collision thrown from her seat to the floor of the car in which she was riding; and for the injuries she thereby sustained she brought this action for damages, averring that they resulted from the gross neglect of the appellant's agents who were operating the trains. It is claimed this neglect consisted in failing to exercise care in flagging the coming train. The evidence is somewhat conflicting as to whether this was done in time to have enabled it to stop before overtaking the passenger train; but whether the fault lay in neglect in this respect, or in the rear train, if it had sufficient notice to enable it to do so, failing to check up, need not be considered, because, whether the one or the other, the testimony is of such a character as authorized the question of the existence or non-existence of gross neglect upon the part of the company's agents to be submitted to the jury. They returned a verdict for $10,000. It is urged that this verdict is, in view of the evidence, so excessive that, conceding it embraces both compensatory and punitive damages, yet this court should reverse the judgment. The existence of ordinary neglect in such a case authorizes compensatory damages, while gross neglect permits the jury to award those which are both compensatory and punitive. In this instance, the jury, if they thought proper, were authorized by the instructions to find both. Whether they have gone beyond a reasonable limit must be determined by the conduct of the company's agents connected with the accident, and the character of the appellee's injuries. While the rule for the measurement of compensatory damages leaves the matter largely to the discretion of the jury, yet the finding must be within the confines of reason. So, too, must exemplary damages be reasonably adequate to the degree of fault. The appellee sustained external bruises, and her nervous system was greatly shocked. There is evidence tending to show, however, that it had been somewhat impaired by previous events. Immediately after the accident, she walked to a friend's house near by, and soon after rode home in a vehicle, a distance of several miles. She was confined to her bed for seven or eight weeks, and suffered from nervousness and sleeplessness. Since she left her bed, she has walked about her room, and been to town once or twice, but has been unable to do any work. The accident occurred in October; the case was tried in March following; and this, briefly stated, was her condition during that period. None of her bones were broken, but at one time since the accident, if not ever since, she has been troubled with partial paralysis, or an insensibility, in one leg, from the knee down. The probable duration of her injuries is not shown by the testimony. Whether they are of a permanent character does not appear. The medical testimony which was introduced is utterly unsatisfactory in this respect. The burden rested upon the appellee to show the extent of her injuries. If of a permanent character, she should have shown it. A perusal of the evidence creates no satisfactory opinion upon this point, and leaves the matter in entire doubt. The physicians who testified say she may recover entirely and she may not.

It is impossible to measure with anything like absolute certainty the amount of punitive damages proper in a case, or the extent of some of the elements of those which are compensatory. The opinion of a jury has been, and properly, no doubt, regarded as the best means of even a fair approximation, and every verdict should be treated *prima facie* as the result of honest judgment upon their part. They are the constitutional triers of the facts of a case, and courts should exercise great caution in interfering with their verdicts. Litigants must not be left, however, to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy, or unreasonable prejudice. In such cases it is one of the highest duties of a court to interfere; otherwise great wrongs will often result, and the party be remediless. Whether it should do so is more easily determinable in a case where compensatory damages only are allowable, because they in part admit of exact measurement. In such cases, this court has often reversed the jury's finding. We see no reason why it should not do so in a case like this one, but with increased caution, perhaps.

In the case now presented there was no intentional injury. An effort was made to flag the coming train, and those in charge of it attempted, upon notice of the danger, to stop it. Whether these efforts were of such a character as left the company open to the charge of gross neglect was a question for the jury. But no purpose to injure is shown; and, while it was properly a question for the determination of the jury whether the company's agents had not been guilty of such neglect as merited punishment by way of punitive damages, yet, in our opinion, a case was not presented by the evidence for a verdict of $10,000, either upon the score of punishment or compensation, or both. It is true that railroad companies, as to their passengers, should be held to the exercise of the utmost care and skill which prudent persons would be likely to exercise as to themselves under the like circumstances, and in the conduct of a business so hazardous as railroading; but in the absence of bad motive or purpose of injury, or a neglect so wanton as to demand the severest punishment, and where it is utterly uncertain what the result of an injury will be, a verdict for such a sum as has been awarded to the appellee strikes one at first blush as the result of either prejudice towards the offending party or an undue sympathy for the one injured. While absolute certainty as to the result of an injury should not be required, yet a mere conjecture, or even a probability, does not warrant the giving of damages for future disability, which may never be realized. The future effect of the injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury. This was not done in this case. The evidence shows that the appellee is as likely to entirely recover, and perhaps in a short period of time, as she is to be permanently affected by the injury. To sustain a verdict like this one under such circumstances would often result in the grossest injustice, and its existence can be accounted for only upon the ground that the jury were swayed by prejudice, or an improper controlling sympathy. The judgment is therefore reversed, and cause remanded for a new trial, consistent with this opinion.

RETAN v. LAKE SHORE & M. S. RY. CO.

(53 N. W. 1094, 94 Mich. 146.)

Supreme Court of Michigan. Dec. 22, 1892.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action by Frank A. Retan against the Lake Shore & Michigan Southern Railway Company to recover damages for personal injuries. Judgment was entered on a verdict for $30,000 in favor of plaintiff, and defendant brings error. Affirmed.

C. E. Weaver (Geo. C. Greene and O. G. Getzen-Danner, of counsel), for appellant. Watts, Bean & Smith and L. R. Pierson, for appellee.

LONG, J. Plaintiff recovered a judgment against the defendant for $30,000 damages for negligent injuries. The negligence complained of was in allowing a sidewalk which crosses defendant's main track, and extends along the side of a public street in the village of Hudson, to become out of repair, and dangerous to public travel, and by means of which the plaintiff's foot was caught and fastened in said walk between one of the planks and one of the rails of defendant's track, and while being so held one of defendant's trains of cars ran over him, cutting off both his feet. The main track of defendant's road, extending easterly and westerly, crosses Main street in that village at a very acute angle. A sidewalk 6 feet wide has been maintained on the north side of Main street for some distance for over 30 years by the owners of the abutting property, and by the village at the street crossings. The defendant company has maintained this walk over its right of way since 1868. In that year the village council, by resolution, directed the building of a sidewalk on the north side of Main street between Tiffin and High streets, and notified the defendant to build that portion across its right of way, which it did, and has ever since maintained it. The planks of the walk inside the railroad tracks ran parallel with the rails. Crossing the track at such an acute angle, the extreme length of the plank sidewalk is about 27 feet, though the walk is only 6 feet wide. The planks are laid away from either rail from 2 to 2¼ inches, to allow the flange of the car wheels to pass between them and the rails. The plank in the walk next the south rail had become split on the west end, so that a piece had been torn out about 14 inches long, leaving an open space between the rail and the plank 3⅝ inches wide at the end, extending 14 inches along the plank, and narrowing down to 2 or 2¼ inches. On January 3, 1891, the plaintiff, while passing along this walk, dropped his mitten near the center of the planking between the rails. He passed beyond the rails about 25 feet, when, missing the mitten, he retraced his steps to get it, and, arriving at the west end of the planking, he turned and saw the fast mail train of defendant approaching from the west. As he turned towards the west, his foot, which was resting upon the south rail of the defendant's track, slipped off, and was caught in this space left by the broken plank. He tried to extricate his foot, and, finding he could not do so, he signaled the train to stop. The train was then at or near what is called the "Stone Bridge," about 584 feet away, and running, as the engineer testifies, about 12 miles an hour, but gaining speed. The engineer, as soon as he saw the plaintiff was caught, made every possible effort to stop the train, but was unable to do so until the engine and tender had run over the plaintiff, and cut off the left foot above the ankle and crushed the right one. Both feet were subsequently amputated; the left one near the knee, and the right forward of the heel. It appears that the plaintiff saw the train coming before he crossed the track the first time, and knew what train it was. He was accustomed to see this train every day. As he left High street on his route west and reached the track, he could see west upon the track several hundred feet distant; and as he crossed over, the train was some 800 feet distant from the crossing. Plaintiff was born and brought up in the village, and had lived there nearly all his life, and had been accustomed to pass along this walk; but he says he had never noticed its condition or this defect. When stopping and turning to look at the approaching train, he did not notice where he put his foot, but says it must have been on the rail, and from there slipped into this hole. This walk between the rails had been twice renewed, the last time about seven years before the accident. The testimony shows that the hole in this plank had been there from six to nine months, and that several other persons, prior to plaintiff's injury, had their feet caught in the same hole, and some of them had considerable difficulty in extricating them.

The declaration charges the breach of duty as follows: "But the defendant, disregarding its said duty in that behalf, on the last day aforesaid, and for a long time, to wit, three months prior thereto, permitted and allowed said sidewalk where it crossed the track of said defendant to become decayed, broken, and out of repair, and one of the planks adjoining and next to the south rail of said track to become split and broken, so that there was a space between the said rail and said plank large enough to receive a man's shoe and foot, and into which a person walking along said walk and across said track was liable to be thrown down, and the foot fastened: and which said hole had been left by defendant to remain and be unrepaired and in a dangerous condition for a space of time, to wit, sixty days prior to the 3d of January, 1891."

It is claimed that under the charter of the defendant company and the general railroad laws of the state no duty is cast upon the defendant company to construct or maintain a sidewalk across a public street, either in a township, village, or city. While it is true that the charter of the defendant company or the general railroad laws of the state do not provide in express terms for the building of a sidewalk, as such, across any public street, yet it is provided by the defendant's charter that whenever the company shall construct its road across a public highway it shall restore it "to its former state, or in a sufficient manner not necessarily to impair its usefulness." In the present case, however, we need not discuss or consider that question. The defendant company, acting under the notification of the common council of the village, did construct the crossing there, and for years has assumed the duty of keeping it in repair. By this act it invited people to pass over it, and it has thus become its duty to keep it in a reasonably safe condition for public travel. As was said in Stewart v. Railroad Co., 89 Mich. 315, 50 N. W. 852: "It was a structure built upon its own land, and by its nature and use was a continual invitation to those lawfully having a right to cross from one side to another at that place to enter upon it and cross there; and, so long as this invitation thus impliedly given to such persons continued, it was the duty of the defendant, independently of any contract, to see to it that it was safe for the purposes implied by the invitation." This principle is supported by abundant authority. Nichols' Adm'r v. Railroad Co., 83 Va. 99, 5 S. E. 171. The same principle was involved in the case of Cross v. Railway Co., 69 Mich. 363, 37 N. W. 361, and the cases there cited. In Spooner v. Railroad Co., 115 N. Y. 22, 21 N. E. 696, the court held the defendant company liable for the injury upon the ground that it had assumed the duty of maintaining the crossing.

2. It is claimed that there was no such defect in the planking between the rails as to make the defendant liable. The action is not based upon the faulty construction of the crossing, but in permitting it to become defective, in that a hole was permitted to remain for a long space of time unrepaired. In the construction a space was left for the flange of the car wheels to pass along the side of the rail. No negligence is claimed on that ground, but that, when the plank became broken and split off sufficient to admit a person's foot, it was not reasonably safe. It was admitted on the trial by the track hands of the defendant company that, if the plank had been examined, the defect would readily have been seen. No claim was made that any such examination was made for a long space of time, and no particular examination for the last six years prior to the injury, except such as could be made by the track hands passing over the crossing on a hand car. Some of defendant's witnesses—and especially the road master—testified that the planking next the rail would be nearly used up by the passing trains in about six months, and yet no inspection of the walk is claimed to have been made, except that above stated by the track hands. There was abundant evidence on the trial that the defect existed, and that the defendant company, by the least care, would have discovered it.

Error is assigned upon the refusal of the court to give several requests to charge. The questions so raised are fully disposed of in what has already been said. The court submitted the question of defendant's negligence to the jury as follows: "Before the plaintiff is entitled to a verdict at your hands here, he must convince you by a preponderance of the evidence—you must be convinced by a preponderance of the evidence in the case—that the company were negligent in permitting this walk to be in the condition which it was in at the time the accident occurred; that that negligence was the direct cause of the injury which the plaintiff claims to have suffered; and that he, himself, the plaintiff, was not negligent in such a way as to contribute himself to the injury which occurred. I say you must be satisfied, before a verdict can be rendered for the plaintiff, of each and all of these propositions. Your first inquiry will naturally be as to whether the defendant was negligent in permitting this walk to be in the condition in which it was; and upon that question you are instructed that the company are bound to exercise that degree of care in the construction and operation of this road as is common to railway companies; that degree of care which, in view of the circumstances, would be required by prudent management. If this defect, which is charged in the plaintiff's declaration,—and which is only that the company permitted this hole to be there next to the rail, as has been described,—if this defect were such a one as that ordinary care on the part of the railroad company would not discover it, and they had no knowledge of it, then there would not be, in law, negligence such as that the defendant would be held responsible in this action. On the other hand, if it was such a defect, if the defect was the cause of the injury, and was such a one as that by careful and prudent management on the part of the company it should have been discovered, then there was negligence in the company in permitting the place to be there, whether they had actual knowledge or not. The railroad company are not insurers; the law does not require that they be insurers against accidents, or against injuries being received by persons and individuals who may come upon their property, or in the vicinity of it. There is danger necessarily incident to the business of managing and operating a railroad company, which all persons are bound to take cognizance of, such as are naturally incident to it; but the law requires that, as I have said, the company shall have in mind the nature of the business which they are carrying on, and shall take such precautions as the nature of it and the perils which are incident to it would seem to require. The ordinary care and prudence which railway management and experience has generally shown are proper. If, then, the company were not negligent in permitting this defect to be in this walk, under these instructions, they are not responsible. If they were,—if they failed to perform the duty which I have stated to you was put upon them under the law,—and failed to exercise that degree of care and prudence which is common in prudent railway management, then there would be negligence." This was a fair submission of these questions to the jury under the evidence in the case.

3. It is claimed that the defendant had no notice of the defect. The testimony shows that the defect had existed for several months; that many persons had noticed it, and several persons, prior to that time, had been caught in the same way at that place, and in the same hole. This testimony was all before the jury, and from which they may well have found that, though the company had no actual notice of the defect, it was its duty to have known it, had it exercised any care. It was competent to show that others were caught in the same hole prior to the time of plaintiff's injuries. Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947.

4. It is claimed that the plaintiff was guilty of contributory negligence in returning to the crossing in face of the approaching train, and especially as he testified that he did not look where he stepped. Several requests to charge were submitted to the court upon this claim, and refused. The court, under the general charge, left that as a question of fact for the determination of the jury, and, as we think, very properly. It appeared that at the time he stepped upon the track the train was nearly 600 feet away. He had seen the train pass there every day for years, and knew the rate of speed it was going. He would undoubtedly have had plenty of time to have passed over and got his mitten, had it not been for the defect, for which the defendant was solely in fault. We cannot say as matter of law that his conduct was such as to charge him with negligence. It is not like the case of one who attempts to cross a railroad track with a team in the face of an approaching train. A very careful and prudent person might have attempted the same thing. It was not a peril voluntarily and unnecessarily assumed, within the meaning of the cases cited by counsel, but an act which under the testimony the jury had a right to pass upon, and determine whether it was negligent or not. It cannot be said either that as matter of law the plaintiff was negligent in not looking where he stepped. He had a right to believe that the crossing was safe. He had passed over it a great many times and had not had his attention called to this defect. It was a way provided by the defendant for him and others of the public to pass, and it cannot be said that a person traveling along a way must at all times look where he steps or be charged with being negligent. It was a question for the jury.

5. It is claimed further that the jury were influenced in awarding so large a verdict by the language of plaintiff's counsel, used in the closing argument. The following portion of such argument is selected, and error assigned upon it: "If you find, gentlemen of the jury, that this defendant ought to pay this boy, I hope you will not quibble over the amount. The good Lord knows he cannot have too much; and yet, gentlemen, as has already been said before you, we do not want you to give such an amount that it might shock the common sense of the community and people generally; but we want enough, and it is for your judgment, and yours only, as to how much it shall be. Nobody else has a right to interfere. Ah, gentlemen, nobody else will interfere." When taken in connection with the other portion of the argument, which is set out in the record, we think counsel cannot claim that anything improper was said, even if the portion of which complaint is made can be said to be improper. Counsel, continuing his remarks to the jury upon that subject, said: "Disabuse yourselves from sympathy; disabuse yourselves from any feeling that you want to do for him,—whether it is right or wrong,—if it is possible that you have any such feeling. Come down to the law and the facts as the court will give them to you. Let it strike where it will. If it will leave this poor boy where he is, under the evidence, then so be it. But don't give him a pittance. Don't give him what, in proportion to the injury he has suffered, would be no compensation. We want such an amount as this brother right here will recognize as a fair and just verdict. Give such a verdict as you believe Clement E. Weaver himself would give, were he one of you." It is not claimed that there was any misstatement of fact or law, and certainly the language would not have a tendency to inflame the minds of the jurors against the corporation. They were told to disabuse their minds from all sympathy, and to give such an amount as would not shock the common sense of men generally; and to this was added the request to give such a verdict as the attorney of the defendant company would give if he were on the jury. It is true that there may have been an appearance of frankness and fairness on the part of counsel, used as a cover while he was attempting to arouse the sympathy of the jury for the plaintiff's condition; but we are not prepared to say that the language was so far prejudicial as to call for a reversal of the judgment. Counsel must have some latitude in the argu-

ment of cases: and, while we have reversed cases for intemperate language of counsel, where it plainly appeared that it was used for the purpose of arousing the passions or prejudices of the jury, which must necessarily prejudice the opposite party, we see nothing in these remarks which should call for any such rule.

6. We have examined this record, and have been unable to find any error in the proceedings. We have not felt called upon to discuss all the assignments of error, but have examined them with that care which the large amount involved demands. One other point demands attention. It is claimed that the amount of damages is excessive. Not having found any error in the proceedings, or anything improper upon the trial tending to prejudice the defendant's rights or inflame the jury, and thereby prejudice them against the defendant, we cannot disturb the verdict on the ground solely that it is greater in amount than we think should have been given. Hunn v. Railroad Co., 78 Mich. 529, 44 N. W. 502; Richmond v. Railway Co., 87 Mich. 392, 49 N. W. 621; Stuyvesant v. Wilcox (Mich.) 52 N. W. 467. I am not prepared to say, however, that cases might not arise where, even under our former rulings, we would not be justified in considering that question. If the verdict was such as to shock the common sense and judgment of mankind, it might call for a different rule, and the court might be justified in overturning it. But that is not so in this case. The jury have taken into consideration the pain and suffering this plaintiff has endured, and the loss to him for the remainder of his years of both feet. It may be large, but the jury alone had the right to determine it. The judgment must be affirmed, with costs. The other justices concurred.

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